

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

IP INNOVATION, L.L.C.)
and TECHNOLOGY LICENSING)
CORP.,)
Plaintiffs)
VS.) Civil Docket No.
2:07-CV-447-RRR
April 30, 2010
RED HAT, INC. and)
NOVELL, INC.)
Defendants) 8:00 A.M.

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE RANDALL R. RADER
UNITED STATES CIRCUIT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

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(Proceedings recorded by mechanical stenography,
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10 * * * * *

11 P R O C E E D I N G S

12 (Jury out.)

08:09 13 THE COURT: Good morning.

08:09 14 Are you holding down the fort,

08:09 15 Mr. Gibbons?

08:09 16 MR. GIBBONS: They sent me as the advance
08:10 17 scout, I think, because I had a suit coat on. They said
08:10 18 head on over.

08:10 19 THE COURT: Okay. Do we have any issues
08:10 20 or needs this morning?

08:10 21 MR. REITER: I think we need to do the
08:10 22 formal charge conference and lodge our objections to the
08:10 23 jury instructions.

08:10 24 THE COURT: That would be very appropriate
08:10 25 at this time. So we met last night. I have given you

08:10 1 my final versions of the instructions.

08:10 2 Mr. Gibbons?

08:10 3 MR. GIBBONS: The Plaintiffs have a few
08:10 4 objections, Your Honor, to the final set of jury
08:10 5 instructions.

08:10 6 We have an objection to the final
08:10 7 instruction with respect to the Inventorship
08:10 8 instruction, Your Honor --

08:10 9 THE COURT: All right.

08:10 10 MR. GIBBONS: -- specifically Part B. And
08:10 11 it's the requirement that each of the inventors work on
08:11 12 the same subject matter.

08:11 13 Further down in that section, it's the
08:11 14 requirement that they must have directly collaborated.

08:11 15 Is it alright if I read it in the record?

08:11 16 THE COURT: This is fine. I think you
08:11 17 need to make at least some kind of record of what your
08:11 18 objections are so that you're protected.

08:11 19 MR. GIBBONS: In the final sentence, the
08:11 20 term regarding each co-inventor engaged with the other
08:11 21 co-inventors.

08:11 22 And then we have objections with respect
08:11 23 to damage instructions, specifically, Part A at the
08:11 24 bottom with respect to burden. Some of the language
08:11 25 that we had wanted inserted had been struck by the

08:12 1 Court, and that deals with the accuracy of the records
08:12 2 and the --

08:12 3 THE COURT: Why don't you read me just a
08:12 4 sentence or two of what you wanted so that it's clear.

08:12 5 MR. GIBBONS: Sure. What was taken out
08:12 6 was where the amount of damages cannot be determined
08:12 7 with precision. Any doubts regarding the amount of
08:12 8 damages must be resolved against Defendants.
08:12 9 Specifically, if absolute damages cannot be determined
08:12 10 with precision from the evidence available from
08:12 11 Defendants is inadequate, such as where a calculation of
08:12 12 damages is impeded by Defendants' incomplete or
08:12 13 inaccurate records, damages may be estimated on the best
08:12 14 available evidence, resulting in uncertainties and
08:12 15 doubts against the Defendants.

08:12 16 And we also have an objection in Section C
08:12 17 with regard to reasonable royalty, specifically the
08:12 18 paragraph regarding Apple, Apple Computer, and the --
08:13 19 specifically the language that -- regarding at least
08:13 20 Apple's internal use.

08:13 21 Is that clear enough, sir?

08:13 22 THE COURT: If I recall right, you wanted
08:13 23 that to say and not sales, or something like that?

08:13 24 MR. GIBBONS: I believe so, Your Honor.
08:13 25 Let me check that.

08:13 1 THE COURT: I think I recall that.

08:13 2 MR. GIBBONS: I'm not sure if we had it in
08:13 3 our version. I think that was proposed by the
08:13 4 Defendants and was part of the discussions, Your Honor.
08:13 5 I had left to go prepare the closing.

08:13 6 THE COURT: I think you've covered pretty
08:13 7 well what I recall as your concerns.

08:13 8 MR. GIBBONS: Fair enough. Thank you,
08:13 9 Your Honor.

08:13 10 THE COURT: Just a comment: I think on
08:13 11 the Inventorship, the Court took most of this language
08:13 12 right from federal circuit opinions. On the damages
08:14 13 portion, the language you refer to came from cases where
08:14 14 there were errors in the records of the Defendants, and
08:14 15 the Defendants were responsible for some inadequacy of
08:14 16 records, which this record doesn't support that, in the
08:14 17 Court's view. It just doesn't seem to be available
08:14 18 records of any kind.

08:14 19 And the final point on the Apple, I think
08:14 20 is dealt with pretty well by the language the Court did
08:14 21 select. But your objections are noted, and I think
08:14 22 preserved.

08:14 23 MR. GIBBONS: Thank you, Your Honor.

08:14 24 THE COURT: Now, Ms. LaValle.

08:14 25 MS. LAVALLE: Good morning, Your Honor.

08:14 1 We have just a few objections to the final
08:14 2 jury charge and the verdict form.

08:14 3 THE COURT: Okay.

08:14 4 MS. LAVALLE: First, we have some
08:14 5 objections to the Court's claim construction. We object
08:14 6 to several of the terms.

08:14 7 THE COURT: Could I for just one
08:15 8 second interrupt you. Did you have claim construction
08:15 9 concerns, Mr. Gibbons?

08:15 10 MR. GIBBONS: I don't believe so. I can
08:15 11 check on that.

08:15 12 THE COURT: Check on that in the interim,
08:15 13 so that we make sure that we have you on record on that,
08:15 14 too.

08:15 15 Please, Ms. LaValle, continue.

08:15 16 MS. LAVALLE: The first term that
08:15 17 Defendants object to the Court's claim construction on
08:15 18 is perceptible as the same tool. The Court's
08:15 19 construction is recognized as the same tool, even if the
08:15 20 objects have some different display characteristics,
08:15 21 including different positions, sizes, and contexts.

08:15 22 Defendants proposed a construction that
08:15 23 reads: Generated to achieve object constancy such that
08:15 24 changes made to shared features of a tool appearing in
08:15 25 one workspace, for example, content, data, et cetera,

08:15 1 are reflected in features of tools in other workspaces.
08:15 2 Defendants believe that the Court's
08:15 3 construction is inconsistent with the intrinsic record
08:15 4 of the patents. And that was perceptible as the same
08:16 5 tool.

08:16 6 The second term that we have objection to
08:16 7 the Court's construction of is workspace data structure.
08:16 8 The Court actually did not construe that term. The
08:16 9 Court said that no construction is necessary.

08:16 10 The Defendants proposed a construction of
08:16 11 body -- the Defendants' construction was stated as body
08:16 12 of interrelated items of data corresponding to a
08:16 13 particular workspace. The Defendants believe that the
08:16 14 Court's failure to construe this term is incorrect as a
08:16 15 matter of law, as it is necessary to construe this term
08:16 16 in order to assist the jury and resolve the parties'
08:16 17 dispute regarding the meaning of this claim term.

08:16 18 The next term that Defendants have an
08:16 19 objection to the construction of is workspace data
08:16 20 similar to the term workspace data structure. Again,
08:16 21 the Court ruled that no construction was necessary, and
08:17 22 Defendants proposed a definition of interrelated items
08:17 23 of data corresponding to a particular workspace.

08:17 24 Again, the Defendants believe that a
08:17 25 construction was necessary to assist the jury and to

08:17 1 resolve the parties' dispute regarding the meaning of
08:17 2 this term.

08:17 3 The Defendants also object to the Court's
08:17 4 construction of two means plus function terms; that is,
08:17 5 control means and display object means. The Court
08:17 6 construed the corresponding structure of control means
08:17 7 to be executable computer code implementing selectable
08:17 8 graphical user interface pop-up menus and icons and
08:17 9 their equivalents.

08:17 10 Defendants believe that under federal
08:17 11 circuit law, it's clear that if you have a computer
08:17 12 implemented means plus function claim, the corresponding
08:18 13 structure should be an algorithm. And in this case,
08:18 14 there was an algorithm disclosed in the specification.
08:18 15 So Defendants proposed corresponding structure to this
08:18 16 means plus function term control means that we presented
08:18 17 was: Procedures and algorithm specified in flowcharts
08:18 18 of exit and enter workspace procedures disclosed in
08:18 19 Figures 13, 18A, and 18B as well as Figure 10 and the
08:18 20 accompanying pseudocode disclosed in Table 1 that was in
08:18 21 Column 21 of the specification representing workspace
08:18 22 data structures and their equivalents.

08:18 23 Defendants' objection to the means plus
08:18 24 function term display object means a similar --
08:18 25 Defendants believe that under federal circuit law, the

08:19 1 corresponding structure of a computer implemented means
08:19 2 plus function claim would be the disclosed algorithm.

08:19 3 But in this case, there was no disclosed
08:19 4 algorithm in the specification, so in this case,
08:19 5 Defendants argue that this claim term was indefinite as
08:19 6 a matter of law. There was no algorithm disclosed as
08:19 7 the corresponding structure for display object means.

08:19 8 The Court construed the structure to be
08:19 9 display system object and its equivalents, and
08:19 10 Defendants believe that that definition is indefinite.

08:19 11 That's all of our objections to the
08:19 12 Court's claim construction.

08:19 13 THE COURT: As you understand, we've
08:19 14 played the game under those rules, so it's little hard
08:19 15 for the Court to reconsider them at this point, but your
08:19 16 objections are noted.

08:19 17 MS. LAVALLE: Thank you, Your Honor.

08:19 18 MR. GIBBONS: Your Honor --

08:19 19 THE COURT: Excuse me. Mr. Gibbons?

08:20 20 MR. GIBBONS: I was going to say that
08:20 21 Plaintiffs' have no objection to the Court's claim
08:20 22 construction.

08:20 23 THE COURT: Okay. Fine.

08:20 24 MS. LAVALLE: We have a few other
08:20 25 objections to --

08:20 1 THE COURT: On the instructions, please
08:20 2 proceed.

08:20 3 MS. LAVALLE: With respect to the
08:20 4 Inventorship instruction, Defendants object to the last
08:20 5 sentence of that instruction. Specifically, Defendants
08:20 6 object to the inclusion of the phrase, in some cases,
08:20 7 before the last sentence that states: In some cases,
08:20 8 the interplay between conception and collaboration
08:20 9 requires that each co-inventor engage with the other
08:20 10 co-inventors to contribute to a joint conception.

08:20 11 Defendants believe that this instruction
08:20 12 is contrary to the federal circuit's recent opinion in
08:20 13 Vanderbilt versus ICOS Corporation, which indicates that
08:20 14 in all cases, the interplay between conception and
08:20 15 collaboration requires that each co-inventor engage with
08:20 16 the other co-inventors to contribute to a joint
08:20 17 conception.

08:20 18 THE COURT: Ouch. You're going to fault
08:21 19 me for not following the federal circuit?

08:21 20 MS. LAVALLE: We think you got it close,
08:21 21 Your Honor.

08:21 22 THE COURT: You're very delicate, but you
08:21 23 continue with the objection you need to make.

08:21 24 MS. LAVALLE: Thank you, Your Honor.

08:21 25 We have several objections to the damages

08:21 1 instruction, and that will be our last objection.

08:21 2 THE COURT: Okay.

08:21 3 MS. LAVALLE: First, we have an objection
08:21 4 to the damages instruction regarding a reasonable
08:21 5 royalty. Specifically, the parties and the Court met
08:21 6 last night and agreed to include a -- or the Court, at
08:21 7 least, allowed us to include a sentence that had to do
08:21 8 with the Apple license and Plaintiffs.

08:21 9 THE COURT: Yes.

08:21 10 MS. LAVALLE: And Defendants agree with
08:21 11 this instruction, except that we disagree with the
08:21 12 inclusion of the phrase, at least. And I'll read the
08:22 13 sentence. It says: With respect to the license
08:22 14 agreement entered into between Apple and Plaintiffs, you
08:22 15 should keep in mind that when Plaintiffs sued Apple, the
08:22 16 law allowed Plaintiffs to receive damages for at least
08:22 17 Apple's internal use.

08:22 18 (Discussion off the record.)

08:22 19 MS. LAVALLE: If Your Honor will --

08:22 20 MR. REITER: I'm sorry, Your Honor. I
08:22 21 didn't mean to interrupt.

08:22 22 The objection is the inclusion of the
08:22 23 phrase, at least Apple's use. So it should be: To
08:22 24 receive damages that predated the filing. So the
08:22 25 reference to Apple's use exclusively, we object to that.

08:22 1 I just wanted that to be clear.

08:22 2 THE COURT: Thank you. I think that the
08:22 3 jury is going to understand that we're talking about the
08:22 4 use that predated. But please continue.

08:22 5 MS. LAVALLE: I'll move on to the next
08:23 6 objection that we have to the damages instruction.

08:23 7 We object to the omission of an
08:23 8 instruction regarding the entire market value rule in
08:23 9 this case. It's our belief that the jury should
08:23 10 consider the questions relating to the entire market
08:23 11 value rule in this case, because Plaintiffs' expert is
08:23 12 presenting an opinion on damages, which applies a
08:23 13 royalty rate to a royalty base.

08:23 14 And Plaintiffs' expert included 100
08:23 15 percent of units that were distributed during the
08:23 16 applicable damages period and did not offer an opinion
08:23 17 that would discount either the royalty base or the
08:23 18 royalty rate for the fact that the majority of
08:23 19 Defendants' products are not used in an infringing
08:23 20 manner.

08:23 21 Finally, we have an objection to -- I'm
08:24 22 sorry -- we have a couple more objections to the damages
08:24 23 instructions. One is, we have an objection to having an
08:24 24 inclusion of a running royalty instruction at all in the
08:24 25 instructions and in the verdict form, because there's no

08:24 1 reliable evidence of royalty base based on a number of
08:24 2 units in this case.

08:24 3 Defendants believe that a reasonable jury
08:24 4 would not be able to apply a royalty rate to a royalty
08:24 5 base in this case and come to a reasonable decision.
08:24 6 The evidence is just too unreliable in this case.

08:24 7 Our last objection to the damages
08:24 8 instruction is that we have an objection to the sentence
08:24 9 in the instruction that states: While Plaintiffs may
08:24 10 not establish the amount of damages by mere speculation
08:24 11 or guess, Plaintiffs satisfy their burden by showing the
08:24 12 extent of damages as a matter of just and reasonable
08:24 13 inference, even if the damages established are an
08:25 14 approximation.

08:25 15 I'm sorry. I think I stated incorrectly
08:25 16 that this was Defendants' proposed instruction, but I
08:25 17 meant that this was Plaintiffs' proposed sentence in the
08:25 18 damages.

08:25 19 THE COURT: Thank you. I understood it
08:25 20 that way.

08:25 21 MS. LAVALLE: Right. We object to this
08:25 22 sentence, because we believe it's contrary to the law,
08:25 23 it's vague, and it may cause confusion for the jury.
08:25 24 And as a consequence, it would be prejudicial to the
08:25 25 Defendants.

08:25 1 Thank you, Your Honor.

08:25 2 THE COURT: Thank you, Ms. LaValle.

08:25 3 Mr. Gibbons, anything else?

08:25 4 MR. GIBBONS: I don't believe we have
08:25 5 anything further.

08:25 6 THE COURT: Okay. We've preserved our
08:25 7 objections.

08:25 8 Mr. Gibbons.

08:25 9 MR. GIBBONS: Other than objections, we do
08:25 10 have a small housekeeping matter.

08:25 11 THE COURT: Sure.

08:25 12 MR. GIBBONS: We're going to buy the jury
08:25 13 lunch. I brought a menu, and we didn't know if they
08:25 14 would like to select items or just order sandwiches.

08:26 15 THE COURT: Can you handle that with
08:26 16 Peggy? Peggy can coordinate that. She works right with
08:26 17 the jury.

08:26 18 MR. GIBBONS: Fair enough. Thank you,
08:26 19 Your Honor.

08:26 20 MR. REITER: I just want to make sure
08:26 21 that's not a PX exhibit, Your Honor.

08:26 22 THE COURT: I think I understood both
08:26 23 parties were -- Mr. Gibbons said that. Mr. Gibbons, I
08:26 24 think, was clear that he had worked with Mr. Lyon on
08:26 25 that.

08:26 1 MR. GIBBONS: We're going to send him the
08:26 2 bill and go from there.

08:26 3 [Laughter.]

08:26 4 THE COURT: Good attorney. You get the
08:26 5 credit; he gets the bill.

08:26 6 MR. HILL: Your Honor, will the Court make
08:26 7 available to us a final written version of the Charge
08:26 8 that you're actually going to read?

08:26 9 THE COURT: Yes. I thought you had that.
08:26 10 Did you have it --

08:26 11 MR. REITER: It was e-mailed out last
08:26 12 night.

08:26 13 THE COURT: It was e-mailed, but we can
08:26 14 get you written copies as well.

08:26 15 MR. HILL: I just wasn't sure if the Court
08:26 16 was making any last-minute changes. So the extent
08:26 17 that --

08:26 18 THE COURT: The Court does not have any
08:26 19 changes.

08:26 20 MR. HILL: Okay. I just wanted to make
08:27 21 sure what I put in front of the jury in terms of either
08:27 22 on a document camera or otherwise to emphasize an
08:27 23 instruction would be the final version so that I didn't
08:27 24 have a boo-boo in that regard.

08:27 25 THE COURT: You should follow along,

08:27 1 because I'm a little notorious for ad libbing here and
08:27 2 there. But I will not depart from the substance as much
08:27 3 as I can. But you should follow along carefully.

08:27 4 If you have any question, what I would
08:27 5 request you to do is request a sidebar right after I --
08:27 6 let me finish -- out of respect, you let me finish, but
08:27 7 then request a sidebar and we'll talk about it. If I
08:27 8 think I misspoke in some way, I will correct it on the
08:27 9 spot.

08:27 10 MR. REITER: You mean finish the whole
08:28 11 thing?

08:28 12 THE COURT: Yes. I'll finish the whole
08:28 13 thing, but -- I will go through the whole thing, and
08:28 14 then if you have a place where you think I slipped or
08:28 15 did something you didn't expect, request a sidebar and
08:28 16 I'll go back and correct that point right before you
08:28 17 give your closing arguments.

08:28 18 MR. HILL: Thank you, Your Honor.

08:28 19 THE COURT: Are we just about ready?

08:28 20 MR. GASEY: Yes, Your Honor.

08:28 21 THE COURT: Give me just one second, and I
08:28 22 actually need to check and see -- we had one juror who
08:28 23 was calling in a little late, and I need to go and check
08:28 24 and see if that juror arrived.

08:28 25 So I'll be right back.

08:28 1 (Recess.)

08:28 2 (Jury in.)

3 THE COURT: Good morning. Please be
08:32 4 seated.

08:32 5 Mr. Reiter.

08:32 6 MR. REITER: With the Court's permission,
08:33 7 I'd like to have Dr. Putnam, Defendants' damages expert,
08:33 8 resume his testimony.

08:33 9 THE COURT: Please.

02:33 10 JONATHAN D. PUTNAM, Ph.D., DEFENDANTS' WITNESS,

02:33 11 PREVIOUSLY SWORN

02:33 12 DIRECT EXAMINATION (CONTINUED)

02:33 13 BY MR. REITER:

02:33 14 Q. Good morning, Dr. Putnam.

08:33 15 A. Good morning.

08:33 16 Q. How are you?

08:33 17 A. Fine. Thanks.

08:33 18 Q. So I'd like to kind of give everybody a chance
08:33 19 to remember where we were before we broke for the
08:33 20 evening yesterday. I believe we were talking about the
08:33 21 structure of the license that might be executed in the
08:33 22 hypothetical negotiation.

08:33 23 Do you recall that?

08:33 24 A. Yes.

08:33 25 Q. Okay. And I think you said that the license

08:33 1 would be a lump-sum license; is that right?

08:33 2 A. That's right.

08:33 3 Q. Okay. And we were reviewing licenses that had
08:34 4 been executed in the past to look and see what kind of
08:34 5 structure those licenses had; is that right?

08:34 6 A. Yes; that's right.

08:34 7 Q. Okay. And so there were four licenses that had
08:34 8 been executed to these patents.

08:34 9 Did I get that right?

08:34 10 A. Yes.

08:34 11 Q. Hewlett-Packard, Central Point, SGI, and Apple?

08:34 12 A. That's right.

08:34 13 Q. And I think we were in the middle of our
08:34 14 discussion about the HP license.

08:34 15 Does that sound right to you?

08:34 16 A. Sure.

08:34 17 Q. Okay. Now, just to refresh everybody's memory
08:34 18 after the evening, could you tell us what the terms of
08:34 19 the HP license were, generally?

08:34 20 A. Sure. Remember, in the HP case, this is for an
08:34 21 add-on product, and HP was selling this product to
08:34 22 another company called Borland. As part of the sale,
08:34 23 they entered into this license with Xerox. The Xerox
08:34 24 license with HP said that HP was licensed for all the
08:34 25 sales that it made in the past, and we calculated that

08:35 1 to be about \$12 million.

08:35 2 And then going forward, Borland would be
08:35 3 licensed for another \$10 million of sales. So there was
08:35 4 a total of about \$22 million worth of sales that were
08:35 5 licensed.

08:35 6 For that license, HP paid \$110,000. There
08:35 7 was one additional provision that Mr. Gemini used that
08:35 8 if they got past 10 million, there would be a 1-percent
08:35 9 royalty, but as far as we know, that never happened. So
08:35 10 the basic terms were a 110,000-dollar payment, \$22
08:35 11 million in sales.

08:35 12 Q. Now, was there anything in the license --

08:35 13 MR. REITER: Maybe we could put up DX770
08:35 14 and go to Exhibit B.

08:35 15 Q. (By Mr. Reiter) Was there anything in the
08:35 16 license that indicated that the license was being
08:35 17 transferred to Borland?

08:35 18 A. Yes. There's an amendment at the end or an
08:35 19 exhibit, I guess it's called, that describes this
08:35 20 license as being negotiated as part of a transfer of the
08:35 21 Dashboard business from HP to Borland on the same date.

08:36 22 Q. Does that tell you anything about what Xerox
08:36 23 knew about the relationship between HP and Borland?

08:36 24 A. Yes. Well, Xerox was, obviously. Because they
08:36 25 were a party to the license, they knew that

08:36 1 Hewlett-Packard was selling off its business on that
08:36 2 day, and Hewlett-Packard wasn't going to be the party
08:36 3 that was licensed. It was going to Borland, and Xerox
08:36 4 knew that, because they signed an agreement in which
08:36 5 Hewlett-Packard said we're selling this business to
08:36 6 Borland.

08:36 7 Q. Now, you know what Borland did with the product
08:36 8 as far as the price goes after it acquired the
08:36 9 company -- or the business?

08:36 10 A. Yes. Like any company, they were excited about
08:36 11 the chance to sell this new product, but they had a new
08:36 12 strategy for it. And their new strategy for it was to
08:36 13 drop the price.

08:36 14 So the first thing they were going to do
08:36 15 was take the price down from \$99 to \$49. They thought
08:36 16 they could make more money doing that, I guess.

08:36 17 Q. I think in your first report, you indicated a
08:37 18 price of \$99 attributable to HP but nothing about
08:37 19 Borland.

08:37 20 Why nothing about Borland?

08:37 21 A. Well, at the time, the transfer to Borland
08:37 22 wasn't relevant when Mr. Gemini was developing his first
08:37 23 set of theories, the ones he subsequently discarded, and
08:37 24 we were talking about the price of an entire system and
08:37 25 the revenue from a system, that was his method of

08:37 1 calculating this.

08:37 2 As part of calculating the revenue for the
08:37 3 system, we used the 99-dollar figure, because that's
08:37 4 what we had for HP. When Mr. Gemini changed his mind
08:37 5 and said let's move to a per-unit royalty and let's take
08:37 6 it at 1 percent, it became important to actually find
08:37 7 out how much this product was sold for in the real world
08:37 8 under the license. And so we did further research and
08:37 9 looked that up.

08:37 10 Q. Now, we had talked about the SGI license, which
08:37 11 was -- which kind, a lump sum or a running royalty?

08:37 12 A. The SGI license was an operating system
08:37 13 license, and it was a lump sum, one 95,000-dollar
08:37 14 payment.

08:37 15 Q. Okay. Apple, lump sum or running royalty?

08:37 16 A. Also lump sum.

08:38 17 Q. Okay. Now, how would you qualify -- given all
08:38 18 the information we just discussed, how would you quality
08:38 19 the HP license, lump sum or running royalty?

08:38 20 A. It's a lump-sum license. There's no evidence
08:38 21 that the running portion of the license was ever
08:38 22 operable.

08:38 23 Q. Okay. And the Central Point, lump sum or
08:38 24 running royalty?

08:38 25 A. That's a running royalty.

08:38 1 Q. Okay. Now, having gone through the licenses
08:38 2 that Xerox or the Plaintiffs executed with respect to
08:38 3 these patents, did you look at any other licenses that
08:38 4 maybe applicable in doing your analysis?

08:38 5 A. Yes. Remember, what you're trying to do -- the
08:38 6 whole context of this is just how would these parties on
08:38 7 both sides of the courtroom behave, if they were sitting
08:38 8 down at a bargaining table.

08:38 9 And so we know that the Plaintiffs, or the
08:38 10 people before them -- Xerox before them, we know that
08:38 11 they negotiated primarily lump-sum licenses. And so now
08:38 12 the question is, what will the Defendants do, if they
08:38 13 were negotiating a license. And the answer is, there's
08:38 14 one license that Red Hat entered into that covers the
08:38 15 accused products, and that's also a lump-sum license.

08:39 16 So both parties, either exclusively or
08:39 17 primarily, negotiate lump-sum licenses.

08:39 18 Q. There was some testimony about a license that
08:39 19 Novell executed. Do you recall that?

08:39 20 A. Yes.

08:39 21 Q. Was that a lump sum or a running royalty based
08:39 22 on the deposition testimony that you heard?

08:39 23 A. Based on the deposition testimony -- so, first
08:39 24 of all, my understanding is it's not for the accused
08:39 25 products, but the structure of that license was the

08:39 1 following: Novell paid on a running basis -- in other
08:39 2 words, pay as you go -- up to a certain amount per year,
08:39 3 okay? And that amount was in the 200,000s, something
08:39 4 like that.

08:39 5 So once you sold enough units to the point
08:39 6 where you were going to pay \$200,000 in that year, but
08:39 7 you stopped keeping track. And since they sold many
08:39 8 more units than that, then every year they just wrote a
08:39 9 check for \$200,000, or whatever it was. So, in effect,
08:39 10 it was a lump-sum payment that you paid every year and
08:40 11 not a pay-as-you-go license. You just pay your check on
08:40 12 January 1st, or whatever, and you're done for the year.
08:40 13 You don't have to keep track of the number of units.

08:40 14 Q. Are you saying Novell keeps track of their
08:40 15 units?

08:40 16 A. No, they don't. The point is, you just write
08:40 17 the check once, and you don't have to worry about
08:40 18 keeping track of anything.

08:40 19 Q. Okay. There was also some correspondence
08:40 20 between the Plaintiffs and the Defendants at the
08:40 21 beginning of the lawsuit.

08:40 22 Do you recall that?

08:40 23 A. Yes.

08:40 24 MR. REITER: Maybe if we could put up
08:40 25 DX739, please.

08:40 1 Q. (By Mr. Reiter) Do you know what this is,
08:40 2 Dr. Putnam?

08:40 3 A. Yes. This is a letter from -- it's on the
08:40 4 stationery of the Niro firm, which is the folks who are
08:40 5 representing the Plaintiffs in this case, and this is a
08:40 6 letter addressed to Mr. Cunningham, who is actually here
08:40 7 in the courtroom. And it's a description of the patents
08:40 8 and basically an offer to settle the litigation if -- on
08:41 9 certain terms.

08:41 10 Q. And what kind of terms did Plaintiffs offer?

08:41 11 A. I think you see at the top -- the jury has
08:41 12 probably seen this, but worth highlighting again. It
08:41 13 says: Settlement proposal -- and I'll just read that --
08:41 14 IPI and TLC, who are the Plaintiffs in this case,
08:41 15 propose a settlement that will fully release Red Hat
08:41 16 from liability under the PARC patents -- that's the
08:41 17 Xerox patents -- through the expiration -- which occurs
08:41 18 later in 2008 -- and also will grant a covenant not to
08:41 19 sue and a paid-up license.

08:41 20 And the important part for our purposes is
08:41 21 for a single lump-sum payment.

08:41 22 Q. Now, I think you prepared a lump-sum summary to
08:41 23 kind of take us through what your conclusion was or why
08:41 24 there should be a lump-sum license?

08:41 25 A. Yes. Yes. This is actually one of the

08:41 1 important things. So remember, there was a prior chart
08:41 2 that I did with a nine-part test, and it was all the
08:41 3 tests that you would apply to the facts to see if you
08:42 4 would -- the parties would negotiate a running royalty.

08:42 5 Each one of those tests indicated that you
08:42 6 wouldn't negotiate a running royalty. And so then the
08:42 7 question becomes, well, is there evidence in favor of
08:42 8 negotiating a lump-sum royalty?

08:42 9 The answer is yes. As we see on this
08:42 10 chart, these are licenses to operating system vendors
08:42 11 and also offers to license. And so in every case, the
08:42 12 person either is the Defendants or is someone like the
08:42 13 Defendants, because they sell operating systems.

08:42 14 So we have the SGI license from Xerox.
08:42 15 That's a lump-sum payment. The cross-license with
08:42 16 Microsoft is a lump-sum payment. The IPI license with
08:42 17 Apple is a lump-sum payment. IPI's licenses to -- or
08:42 18 IPI's -- the Plaintiffs' offer to license to Plaintiffs
08:42 19 (sic), both Red Hat and Novell, were for lump-sum
08:42 20 payments.

08:42 21 And finally, when Red Hat negotiated a
08:42 22 license with DataTern, that was not for these patents,
08:42 23 but it was a lump-sum payment. And so all of the
08:42 24 operating system licenses that we are able to examine
08:43 25 are structured as a lump sum.

08:43 1 Q. That DataTern license that you just mentioned,
08:43 2 is that the license you were talking about a moment ago
08:43 3 when you said one of the Defendants had a-lump sum
08:43 4 license?

08:43 5 A. Yes; that's right.

08:43 6 Q. Okay. Now, let's turn to valuation or I think
08:43 7 how much the parties would have paid in the hypothetical
08:43 8 negotiation.

08:43 9 How do you do that? What do you look at
08:43 10 to determine what the value of the patent is?

08:43 11 A. Well, this is -- you know, mostly common sense,
08:43 12 and we've actually gone through most of it. The
08:43 13 question is, what do other people pay for these patents
08:43 14 when they're being traded in the marketplace.

08:43 15 What you want to get is, what's their fair
08:43 16 market value. And like with patents or cars or houses,
08:43 17 the way you determine the fair market value is what do
08:43 18 people pay for either the same thing or for things that
08:43 19 are similar.

08:43 20 So we go back to the licenses and look at
08:43 21 the actual -- instead of just focusing on the structure,
08:43 22 it's the payment terms. So remember, I told you at the
08:43 23 beginning it's not just what you pay but how you pay it.
08:43 24 We've talked about how you pay it; you pay it as a lump
08:44 25 sum. Now we're going to talk about what you pay.

08:44 1 Q. So did you break up your analysis between
08:44 2 operating systems and add-on licenses in determining
08:44 3 valuation?

08:44 4 A. Yes.

08:44 5 Q. Okay. So the two operating system licenses, I
08:44 6 think, are Apple and SGI?

08:44 7 A. That's right.

08:44 8 Q. So let's talk about the SGI license first. How
08:44 9 much did they pay again?

08:44 10 A. \$95,000, lump sum.

08:44 11 Q. Okay. And how long did that license last?

08:44 12 A. That was for 13 years, from 1995 through 2008,
08:44 13 when the patents ended.

08:44 14 Q. Okay. So from when they started a license
08:44 15 until the patents died?

08:44 16 A. That's right.

08:44 17 Q. Okay. And how about Apple, how much did they
08:44 18 pay?

08:44 19 A. \$1.25 million.

08:44 20 Q. Okay. And what did that cover?

08:44 21 A. Time period you mean?

08:44 22 Q. No. Actually, I was thinking product-wise.

08:44 23 A. Oh, product-wise, it covered all of Apple's
08:44 24 products that they might sell anywhere.

08:44 25 Q. Everything?

08:44 1 A. Everything.

08:44 2 Q. Okay. And now how long did that last?

08:44 3 A. And that was for -- it was in 2007. You could
08:44 4 go back as much as six years.

08:44 5 MR. VICKREY: Your Honor, we object to
08:45 6 this for the same reasons we discussed last night,
08:45 7 trying to suggest that it goes back for sales six years
08:45 8 prior.

08:45 9 THE COURT: I think you can clarify this
08:45 10 when you get a chance to inquire, Mr. Vickrey.

08:45 11 MR. VICKREY: Thank you, Your Honor.

08:45 12 THE COURT: Please proceed.

08:45 13 Q. (By Mr. Reiter) How long was the Apple license?

08:45 14 A. Well, certainly, this is -- this is a legal
08:45 15 question. My understanding of the law is that you could
08:45 16 go back six years from the time of filing of a lawsuit
08:45 17 and then forward another year and a half until the
08:45 18 patents ended. So in total, about seven and a half
08:45 19 years it covered.

08:45 20 Q. How does Apple sales or revenue compare to the
08:45 21 revenue of the Defendants?

08:45 22 A. Oh, it's much, much larger. Apple sells in the
08:45 23 tens of billions.

08:45 24 MR. VICKREY: Objection, Your Honor, 403.
08:45 25 We're getting into sales that have nothing --

08:45 1 THE COURT: Mr. Vickrey, this is something
08:45 2 you can deal with on cross.

08:45 3 MR. VICKREY: All right.

08:45 4 THE COURT: Thank you. Please proceed.

08:45 5 Q. (By Mr. Reiter) Okay. So that was the
08:46 6 two-operating system licenses, the two add-on licenses,
08:46 7 Central Point, HP, how much did they pay.

08:46 8 A. Yes, so now we've been through this. For the
08:46 9 operating system add-ons, the HP license was \$110,000
08:46 10 lump sum, and the Central Point license was 25 cents per
08:46 11 copy.

08:46 12 Q. Is there any evidence that Central Point paid
08:46 13 anything to Xerox?

08:46 14 A. No.

08:46 15 Q. How long did the HP license last?

08:46 16 A. That license was negotiated in 1994 and, again,
08:46 17 through the end of the patent's life, so about 14 years.

08:46 18 Q. What about Central Point?

08:46 19 A. Also negotiated in 1994, so also 14 years.

08:46 20 Q. So can you summarize your conclusions about
08:46 21 what the value one might appraise these patents at based
08:46 22 on these prior patents?

08:46 23 A. Sure.

08:46 24 Q. Or prior licenses? Excuse me.

08:46 25 A. Yeah, the best evidence is from the operating

08:47 1 system licenses and because the Defendants sell
08:47 2 operating systems.

08:47 3 And so my conclusion, based on all of the
08:47 4 evidence, is that the parties would have agreed to a
08:47 5 payment of about -- or the value of the license --
08:47 6 comparable value for the parties is about \$100,000.

08:47 7 Q. So is that it, we're done? Is it \$100,000?

08:47 8 A. Well, no. You've got to adjust for the -- for
08:47 9 various factors in order to make the license that the
08:47 10 Defendants would have negotiated comparable to the
08:47 11 licenses that we actually observe in the marketplace.

08:47 12 So, for example, if I'm trading in my
08:47 13 Jeep, there's a certain value for Jeeps, but you would
08:47 14 adjust for various factors. For example, I don't drive
08:47 15 my Jeep very much and so it's got low miles. And so
08:47 16 that means that the price of my particular Jeep would go
08:47 17 up relative to the average Jeep.

08:47 18 And so we have to look at those things
08:47 19 that would cause you to adjust the license one way or
08:47 20 the other.

08:47 21 Q. Is one of those factors usage, like you talked
08:47 22 about with respect to your Jeep? How much the
08:48 23 Defendants would use the technology in their products?

08:48 24 A. Exactly. And that's one of the issues -- you
08:48 25 know, that I know is a bone of contention in this case.

08:48 1 Remember, not every copy of the software
08:48 2 is capable of infringing, because not every copy has a
08:48 3 display associated with it or has a user interface
08:48 4 installed on it. So you would -- like if -- in my case
08:48 5 or in the case of my Jeep, you would discount the price
08:48 6 if something was not used as much -- well, I guess it's
08:48 7 backwards now.

08:48 8 The point of it is, you need to adjust for
08:48 9 the number of units that are actually using the
08:48 10 invention. In this case, because fewer units use the
08:48 11 invention, that would mean a lower price.

08:48 12 Q. What about demand for the product; does that
08:48 13 come into play?

14 A. Sure. You want to see whether the invention is
08:48 15 actually the basis for customer demand, so you want to
08:48 16 look at things like do customers buy the product, or in
08:48 17 this case, do they choose to download the Red Hat or
08:48 18 Novell products because of the enhanced workspace
08:49 19 switching feature.

08:49 20 And there's no evidence that I've seen
08:49 21 that anybody chose the Red Hat products because of this
08:49 22 feature. Even if they use it, it wasn't the basis of
08:49 23 their demand. It's just something, you know, that they
08:49 24 use.

08:49 25 Q. What about the Novell products, same

08:49 1 conclusion?

08:49 2 A. And the same conclusion, yes, exactly.

08:49 3 Q. Okay. Anything -- does marketing materials
08:49 4 come into play? Do you look at those?

08:49 5 A. Yes, I looked at all the marketing materials.
08:49 6 You know, you have sales reps and things like that and
08:49 7 they say, okay, when you go out in the marketplace, we
08:49 8 want you to explain why our product is better than
08:49 9 everybody else's product, and here's the 25 things we
08:49 10 want you to keep in mind about why our product is the
08:49 11 best.

08:49 12 And so I went through those datasheets to
08:49 13 see what they told their sales reps to tell their
08:49 14 customers. And there's no place in those datasheets
08:49 15 where it says anything about make sure you mention the
08:49 16 enhanced workspace feature. So the sales reps aren't
08:49 17 talking that up, and so it can't be the reason why
08:49 18 people actually choose to consume a Red Hat or a Novell
08:49 19 product.

08:49 20 Q. Now, is there any kind of objective evidence or
08:49 21 information that you looked at about the relative
08:50 22 importance or quantity of the feature in the product?

08:50 23 A. Sure. One of the things that people sometimes
08:50 24 do is -- and this is just sort of a back-of-the-envelope
08:50 25 calculation, but it's worth examining -- is you look at

08:50 1 all the lines of code in the entire system. There's
08:50 2 millions of lines of code.

08:50 3 As I understand it, Fedora has 204 million
08:50 4 lines of code. I can't imagine how much writing that
08:50 5 is, but it's thousands of software engineers working to
08:50 6 write various parts of the system.

08:50 7 Then you're asked the question, well, the
08:50 8 enhanced workspace switching feature, how many lines of
08:50 9 code is that relative to the total? Dr. Zimmerman said
08:50 10 he identified about 6,300 lines, as I recall, that were
08:50 11 lines of code that pertained to the enhanced workspace
08:50 12 switching feature. So you've got 6,300 lines that are
08:50 13 the feature and 204 million that are the entire package.
08:51 14 So you might ask the question, well, what share of the
08:51 15 total is the feature?

08:51 16 Q. Was that Dr. Zimmerman or Mr. Gray, Defendants'
08:51 17 expert?

08:51 18 A. I'm sorry. It may have been Mr. Gray. I may
08:51 19 have misspoken.

08:51 20 Q. Okay. Did you prepare a slide to kind of give
08:51 21 this -- give us all a perspective of the quantity?

08:51 22 A. Sure. Yes, I did actually.

08:51 23 It's hard to understand with computer
08:51 24 code. It's easier with things you can touch.

08:51 25 MR. REITER: If we could put the car slide

08:51 1 up.

08:51 2 A. So let's do the math with the car. So 6,300
08:51 3 lines out of 204 million lines is 0.003 percent of the
08:51 4 total number of lines. And so if you were applying that
08:51 5 to a car, that's a very tiny number. If you're applying
08:51 6 that to a car, suppose your car cost \$30,000, what is
08:51 7 0.003 percent of a 30,000-dollar car?

08:51 8 Well, that's something that's worth about
08:51 9 90 cents. That's the share of the total that's
08:52 10 represented by this feature.

08:52 11 THE COURT: Mr. Vickrey?

08:52 12 MR. VICKREY: May we have a sidebar
08:52 13 conference?

08:52 14 THE COURT: Yes.

08:52 15 (Bench conference.)

08:52 16 MR. VICKREY: This is like a reverse
08:52 17 entire market value thing. They're trying to jam the
08:52 18 reverse argument down our throats. That's not the
08:52 19 theory of the case. It's prejudicial. You saw a piece
08:52 20 of the car. We're not asking for a piece of the car.

08:52 21 MR. REITER: This is a very small part of
08:52 22 the overall system. In the SGI license, for example,
08:52 23 SGI was willing to take it out. They paid \$95,000 which
08:52 24 shows a de minimis value of the --

08:52 25 MR. VICKREY: Then let him focus on that.

08:52 1 THE COURT: Okay. Well, I think the way
08:52 2 to do to deal with this is to allow you to clarify
08:52 3 the -- how this should be applied on cross-examination,
08:53 4 and then we'll proceed that way.

08:53 5 Thank you.

08:53 6 (Bench conference concluded.)

08:53 7 THE COURT: Mr. Reiter, you were
08:53 8 inquiring.

08:53 9 MR. REITER: Right, yes. Thank you, Your
08:53 10 Honor. Just looking to see where I was.

08:53 11 Q. (By Mr. Reiter) So have you seen any evidence
08:53 12 that demonstrates that the accused feature is -- or this
08:53 13 enhanced workspace, switching as you call it, is the
08:53 14 basis of consumer demand?

08:53 15 A. No. As we discussed, I haven't found any
08:53 16 reason to believe that any consumer actually makes a
08:53 17 decision to purchase this product or to acquire this
08:53 18 product -- they don't purchase it. They acquire it.
08:53 19 They don't download it.

08:53 20 Nobody makes their decision to do that
08:53 21 based on whether it's got enhanced workspace switching
08:53 22 or not.

08:53 23 Q. How does that play into how you value the
08:53 24 patents?

08:53 25 A. Well, again, all the things equal, that would

08:53 1 mean that you would reduce the price you would pay,
08:54 2 particularly relative to situations where an -- if
08:54 3 you're pricing it relative to add-on product.

08:54 4 If somebody buys this as an add-on, it's
08:54 5 because they want it. But the vast majority of
08:54 6 consumers don't consider this to be an important
08:54 7 determinant of why you actually buy the product.
08:54 8 They're not trying to add it onto their system. It just
08:54 9 comes automatically, and they don't think about it.

08:54 10 Q. So did you prepare a chart that kind of shows
08:54 11 the different factors you might look at to value the
08:54 12 intellectual property or the patent?

08:54 13 A. Yes.

08:54 14 MR. REITER: If we could put up the
08:54 15 adjustments chart, please.

08:54 16 Q. (By Mr. Reiter) Is this that chart?

08:54 17 A. Yes. So -- I'm sorry. Go ahead.

08:54 18 Q. Okay. I was going to say, if you could explain
08:54 19 it.

08:54 20 A. Sure. So -- so remember we talked about -- so
08:54 21 we have -- this is not rocket science. People pay about
08:54 22 \$100,000 when they license these patents. The question
08:54 23 is, is that the right number, or would you make some
08:54 24 adjustments.

08:54 25 And so we just talked about some of these

08:54 1 adjustments that we would make, and you'll see there's
08:55 2 eight of them that I put up here. And the first seven
08:55 3 of them have one thing in common. And that is that if
08:55 4 you were taking that adjustment into account, you would
08:55 5 reduce that \$100,000 because of that factor.

08:55 6 So, for example, the first one on use,
08:55 7 many of the Defendants' units can't infringe the patent
08:55 8 because they don't have a display. Similarly, it's a
08:55 9 tiny share of the total features in code in the entire
08:55 10 product, so it can't be the basis of consumer demand.

08:55 11 Q. What about the passage of time, how does that
08:55 12 play in?

08:55 13 A. That's, I guess, the fifth one down there.

08:55 14 THE WITNESS: Do I have a pointer?

08:55 15 A. There we go, passage of time right there.

08:55 16 Okay. So three of the four licenses were
08:55 17 negotiated in the 1990s, and so as we all know from
08:55 18 being consumers, prices change over time. Some prices
08:55 19 go up over time; other prices go down over time, okay?

08:55 20 Software is one of those things whose
08:55 21 price decreases over time. It's sort of like big TVs.
08:56 22 I was looking at trying to figure out how much a
08:56 23 big-screen plasma TV cost back in 2002, which is only
08:56 24 eight years ago. It turns out that the average price of
08:56 25 a big screen TV eight years ago was about \$6,000.

08:56 1 So then I went to the Wal-Mart website and
08:56 2 said, well, what do you buy a big-screen TV for today?
08:56 3 Well, it's about \$700. So when you've got a long period
08:56 4 of time since the licenses were negotiated, in this case
08:56 5 about 15 years since the mid-1990s, you need to take
08:56 6 that passage of time into account.

08:56 7 And so what I did was go to the government
08:56 8 website. It's called the Bureau of Labor Statistics.
08:56 9 They track prices of everything that you could possibly
08:56 10 want to buy, including the prices of software, and
08:56 11 prices have gone down since the mid-1990s. And so if
08:56 12 you were adjusting for that, for when the Defendants
08:56 13 were actually negotiating ten years later, you would
08:56 14 reduce the price.

08:56 15 Q. I see the last one is removal of uncertainty.
08:56 16 What does that mean?

08:56 17 A. Well, this is something that came up a little
08:56 18 bit with Mr. Gemini's testimony. One of the things that
08:57 19 makes these licenses different from what's happening in
08:57 20 the hypothetical negotiation -- remember, the
08:57 21 hypothetical negotiation is just something we're
08:57 22 imagining in our minds. It never actually happened.

08:57 23 Or imagining these two parties, instead of
08:57 24 fighting in the courtroom, we're imagining them
08:57 25 bargaining at a bargaining table. The Plaintiffs have

08:57 1 already bargained at the bargaining table over these
08:57 2 patents, but when they were bargaining in the past for
08:57 3 real, they were bargaining over a patent that hadn't
08:57 4 actually been fought out in court. Nobody knew whether
08:57 5 it was invalid; nobody knew whether it was infringed.

08:57 6 If you folks decide that this patent is
08:57 7 invalid and infringed, then that gives it sort of your
08:57 8 seal of approval. It's more valuable to have a patent
08:57 9 that's been found to be invalid and infringed than to
08:57 10 have one that might be valid and infringed or might not
08:57 11 be.

08:57 12 So in the past when we look at these
08:57 13 licenses, they may have been discounted in price,
08:57 14 because nobody knew whether a jury was going to find
08:58 15 them valid and infringed or not.

08:58 16 If the Defendants are supposed to pay for
08:58 17 a valid and infringed patent, they should pay more than
08:58 18 people in the past have paid, because they're buying
08:58 19 something that's more valuable.

08:58 20 Q. Now, let me interrupt you there, Dr. Putnam.

08:58 21 In the licenses that we've looked at,
08:58 22 Central Point, HP, SGI, and Apple, was there litigation
08:58 23 associated with any of those licenses?

08:58 24 A. There was litigation associated with the Apple
08:58 25 license and with Central Point.

08:58 1 Q. Okay. And with respect to Central Point, was
08:58 2 there this uncertainty about infringement?

08:58 3 A. Well, apparently not, because -- or if
08:58 4 anything, it was reduced, because in Central Point,
08:58 5 remember the agreement says we, Central Point, agree
08:58 6 that we infringe these patents. And so they're not
08:58 7 arguing anymore about whether they infringe, because
08:58 8 that was their product; that's not Red Hat's product but
08:58 9 a Novell product. But that was their product.

08:58 10 We agree that we infringe these patents,
08:59 11 and so the question is, was the price they paid
08:59 12 discounted? If you've already agreed that you
08:59 13 infringed, then there's no longer any uncertainty about
08:59 14 whether you infringe.

08:59 15 And that's actually something that the
08:59 16 Court is enforcing. It's a consent judgment, not just
08:59 17 an agreement. And so the Court and both parties agree
08:59 18 that Central Point infringed. And in that case, you
08:59 19 wouldn't discount the price for uncertainty about
08:59 20 infringement.

08:59 21 Q. In your analysis, did you take this uncertainty
08:59 22 into account?

08:59 23 A. Yes.

08:59 24 Q. How did you do that?

08:59 25 A. Well, I used a study by a woman named Kimberly

08:59 1 Moore, who was at the time a professor at George Mason
08:59 2 University, is now actually a colleague of Judge Rader's
08:59 3 on the federal circuit bench.

08:59 4 And she did a study of all the patent
08:59 5 litigation in the United States, and she looked at the
08:59 6 rate at which a patentee succeeds at trial, how often do
09:00 7 patentees win.

09:00 8 And so one of the ways you might think
09:00 9 about this discount is that the parties are sitting down
09:00 10 and trying to bargain over a license, and they don't
09:00 11 know whether a patent is -- who's going to win at trial.

09:00 12 They might say, well, how often does the
09:00 13 plaintiff win. It turns out the plaintiff wins about 58
09:00 14 percent of the time. Averaged over the entire country,
09:00 15 averaged all patent trials, that's just the number.

09:00 16 Q. Now, we've heard some other numbers, I think,
09:00 17 from the Plaintiffs' from other studies. Are you aware
09:00 18 of those?

09:00 19 A. Yes. That's her study. I used that one.
09:00 20 There are other studies that are generally in the
09:00 21 similar range.

09:00 22 Q. Okay. There was some particular talk, I think,
09:00 23 about a study by Mr. Janake?

09:00 24 A. Yes.

09:00 25 Q. What does that study say?

09:00 1 A. So Mr. Janake is -- now we're getting into
09:00 2 academics here. But Mr. Janake is a professor of law,
09:00 3 and he did another study, like Professor Moore's, and he
09:00 4 looked at cases that only went up on appeal to the
09:00 5 federal circuit. That's the highest sort of patent
09:01 6 court in the land.

09:01 7 And he studied that particular subset of
09:01 8 cases to see what the success rate was for the
09:01 9 Plaintiffs in those cases.

09:01 10 Q. What did he find?

09:01 11 A. He found a success rate of about 25 percent.

09:01 12 Q. Do you think that study was appropriate or is
09:01 13 meaningful?

09:01 14 A. Well, Professor Janake is a lawyer; he's not an
09:01 15 economist; he's not a statistician. He's a very smart
09:01 16 man, actually, but he made sort of a rookie mistake.

09:01 17 The rookie mistake is this: A lawyer
09:01 18 would think, well, the important thing to do is to look
09:01 19 at all the cases that are actually filed on appeal,
09:01 20 because that way we have a final judgment. We have the
09:01 21 highest court in the land determining whether these
09:01 22 patents are valid or invalid, so let's look at these
09:01 23 cases, because we can be certain about the results of
09:01 24 these cases.

09:01 25 The problem is that when you look only at

09:01 1 the cases that get appealed, there are also the cases
09:01 2 where the defendants have the best arguments. And so in
09:01 3 cases where the defendants have the best arguments, the
09:02 4 plaintiffs, the patentees, are also the most likely to
09:02 5 lose.

09:02 6 And so all of this to say that the cases
09:02 7 that Professor Janake looked at was not representative
09:02 8 of the entire population.

09:02 9 Q. I'm sorry. I didn't mean to interrupt.

09:02 10 A. All I was going to say is it's sort of like
09:02 11 this: Suppose you were the repair shop down at the Ford
09:02 12 dealer, okay, and you looked at cars that came in for
09:02 13 service, okay, and people brought their cars in, and
09:02 14 they need spark plugs, and they've got flat tires, all
09:02 15 kinds of adjustments, and there's all kinds of problems
09:02 16 with the cars, okay?

09:02 17 You'd look at these cars and you'd say,
09:02 18 man, the cars on the road today are in terrible shape.
09:02 19 Transmissions are broken, headlights are out. All the
09:02 20 cars are broken.

09:02 21 Well, if you thought that, that would be
09:02 22 the wrong conclusion, because the only cars that are
09:02 23 brought in for service are the ones that have something
09:02 24 wrong with them. They don't represent all the cars on
09:02 25 the road. They represent what an economist calls a

09:02 1 selected sample; it's a biased sample.

09:02 2 And Professor Janake used a biased sample,
09:02 3 so that's why I didn't use his numbers.

09:03 4 Q. So if I understand correctly, you used a
09:03 5 multiplier of, I think, 1.72, the 58 percent; is that
09:03 6 right?

09:03 7 A. Yes. And so if you want to undo the
09:03 8 discount -- remember we talked about the 59 percent --
09:03 9 if you want to undo that discount, you just divide by
09:03 10 .58, which means multiplying by 1.72. I'm sure there's
09:03 11 no chart here to show you how this is done.

09:03 12 The thing you need to bear in mind is that
09:03 13 on the last line here where you're trying to remove the
09:03 14 effects of uncertainty and make sure that we compensate
09:03 15 the Defendants adequately, we're going to take that
09:03 16 100,000-dollar number, and we're going to multiply it by
09:03 17 1.72 to increase damages up to \$172,000 so that we're
09:03 18 sure that the Defendants (sic) are fully compensated.

09:03 19 They're going to pay -- the Plaintiffs are
09:03 20 fully compensated. We're going to make sure the
09:03 21 Defendants pay more than what other people have paid,
09:03 22 because the Defendants are using a valid and infringed
09:03 23 patent, if you folks find that.

09:03 24 Q. If you take all of the studies that were done
09:04 25 or that you're aware of and you kind of average the

09:04 1 probabilities, what do you get?

09:04 2 A. You would get -- instead of 1.72, you'd get
09:04 3 about 2.08, I think. I did the math, yeah.

09:04 4 Q. Is that substantially higher?

09:04 5 A. No. It would mean, instead of increasing the
09:04 6 number up to \$172,000, you'd increase it up to about
09:04 7 208,000, and so it's still very close.

09:04 8 Q. So did you prepare a chart that took into
09:04 9 account or showed what you did with these adjustments?

09:04 10 A. Yes.

09:04 11 MR. REITER: Put up the next chart,
09:04 12 please.

09:04 13 No, not that one.

09:04 14 A. Right. So here's what we did.

09:04 15 Q. (By MR. Reiter) Just quickly go through that.

09:04 16 A. Okay. So we're not going to go through each
09:04 17 line of this, because you can divide all these lines
09:04 18 into two groups. There's what I did and what I didn't
09:04 19 do, okay?

09:04 20 The first seven things are reasons why you
09:05 21 would reduce the damages. They don't use all the units;
09:05 22 it's a tiny feature; you only need a license in the
09:05 23 U.S.; it's a short period of time.

09:05 24 And what I decided to do was disregard all
09:05 25 of those reasons for reducing the damages. So you have

09:05 1 that 100,000-dollar number. You could take that down.
09:05 2 You could take each one of these seven reasons and you
09:05 3 could nickel-and-dime your way down to some smaller
09:05 4 number. I didn't do that.

5 Q. What did you do?

09:05 6 A. I just kept it at \$100,000.

09:05 7 Q. Then what did you do?

09:05 8 A. The one thing I did do is the bar in the
09:05 9 yellow, and that's increase it. There's one factor that
09:05 10 would cause you to increase the damages, and that's
09:05 11 eliminating this uncertainty.

09:05 12 And I did do that, so we kept it at
09:05 13 \$100,000. We didn't chisel away at that, and then we
09:05 14 increased it up to 172,000 to remove the effects of any
09:05 15 litigation discount.

09:05 16 Q. And you did that even though there was only one
09:05 17 case, the Apple case, in which that litigation discount
09:05 18 really seemed to apply?

09:05 19 A. That's right.

09:05 20 Q. Now, would you say that this is a conservative
09:06 21 approach or more of an aggressive approach?

09:06 22 A. No, I would say it's conservative. We're
09:06 23 trying to do everything we can -- you'll hear about the
09:06 24 law -- but the statute says the damages have to be
09:06 25 adequate to compensate the patentee.

09:06 1 So I wanted to make sure that if I made
09:06 2 any mistakes, I made them in favor of the patentee. And
09:06 3 so I ignored all the reasons for reducing damages and I
09:06 4 included the one reason for increasing the damages.

09:06 5 Q. Now, what was your final conclusion? If the
09:06 6 patents were valid and infringed, what do you think that
09:06 7 the damages should be that Red Hat would pay?

09:06 8 A. The final conclusion is \$172,000 in a lump-sum
09:06 9 payment all in.

09:06 10 Q. Okay. And what about Novell?

09:06 11 A. And so for Novell, Novell is actually much
09:06 12 smaller than Red Hat measured by revenue. We know that
09:06 13 revenue plays a role in the size of the overall payment.
09:06 14 Since Novell is about a tenth of the size, they'd pay
09:06 15 about a tenth less, if you were adjusting for revenue,
09:07 16 then that would be one-tenth of 172,000, which is
09:07 17 17,200.

09:07 18 Q. So \$172,000 for Red Hat; is that right?

09:07 19 A. Yes.

09:07 20 Q. And \$17,200 for Novell?

09:07 21 A. If you were adjusting based on revenue; that's
09:07 22 right.

09:07 23 Q. Okay. And that's your opinion of damages?

09:07 24 A. Yes.

09:07 25 Q. Okay. Now, let's finish up. I think you had

09:07 1 some things you wanted to talk about with respect to
09:07 2 Mr. Gemini's analysis; is that right?

09:07 3 A. That is right.

09:07 4 Q. Okay. Do you agree with his analysis?

09:07 5 A. No.

09:07 6 Q. What's wrong with it?

09:07 7 A. Well, I think there's four things. Mr. Gemini
09:07 8 remember -- it's going to be sort of the opposite of
09:07 9 what we just heard.

09:07 10 Mr. Gemini says that the agreement
09:07 11 shouldn't be a lump sum; it should be a running royalty;
09:07 12 it should be pay as you go. I disagree with that.

09:07 13 If it's a pay-as-you-go license, then
09:07 14 Mr. Gemini has to compute both the royalty rate and the
09:07 15 royalty base. I think his royalty rate is inflated.
09:07 16 The ticket price is too high. And I think the royalty
09:07 17 base is inflated, the number of rides that he goes on.

09:08 18 Q. Okay. So let's talk about the rate first.

09:08 19 A. Sure --

09:08 20 Q. -- all right?

09:08 21 Do you recall what Mr. Gemini was saying
09:08 22 was the per-unit rate?

09:08 23 A. 62 cents.

09:08 24 Q. Okay. And do you recall briefly how he got
09:08 25 there?

09:08 1 A. Yeah. Mr. Gemini took the -- he ignored the
09:08 2 two operating system licenses, even though the
09:08 3 Defendants sell operating systems, and he focused on the
09:08 4 two add-on licenses; that's the HP and Central Point.

09:08 5 HP, he said, was a 99-cent royalty per
09:08 6 unit, and Central Point is 25 cents per unit, and he
09:08 7 just averaged those, added them up together and divided
09:08 8 by two and came up with 62 cents.

09:08 9 Q. Okay. Now, where did he get the 99 cents from?

09:08 10 A. Well, Mr. Gemini got 99 cents, because,
09:08 11 remember, in the HP license, there was this kicker at
09:08 12 the end that said if you ever get to \$10 million in
09:08 13 sales, then you pay at a 1-percent royalty rate. That
09:08 14 never happened. He's using that 1-percent number.

09:09 15 And then he's saying, well, okay, let's --
09:09 16 that's something that would have happened in the future,
09:09 17 if it ever happened at all. Then he says, let's look
09:09 18 back in the past at what HP actually charged. They
09:09 19 actually charged 99 cents.

09:09 20 So he takes the past price from HP, and he
09:09 21 takes the future 1 percent that Borland might charge
09:09 22 some day, and he multiplies them together and gets
09:09 23 1 percent of \$99, and that's 99 cents.

09:09 24 Q. If you just look at the period of the 12.5
09:09 25 million and the \$10 million in that license on the

09:09 1 \$110,000, is there some percentage that you can
09:09 2 calculate?

09:09 3 A. Right. So -- in the real world, what actually
09:09 4 happened was that HP sold 12 million dollars' worth of
09:09 5 stuff, and Borland was licensed to sell another 10
09:09 6 million dollars' worth of stuff, 22 million.

09:09 7 They paid \$110,000 for those rights. If
09:09 8 you ask yourself, what percentage is that, what
09:10 9 percentage of the total sales is that payment, it's
09:10 10 one-half of 1 percent.

09:10 11 Q. And what would you apply that one-half of 1
09:10 12 percent to?

09:10 13 A. Well, if you were looking at the one-half of
09:10 14 1 percent to the licenses going forward from the day it
09:10 15 was actually signed to the product -- remember, on the
09:10 16 day that the license is signed, the Dashboard product,
09:10 17 the HP product, transfers from HP to Borland. And
09:10 18 Borland says, we thought HP was selling it for too much
09:10 19 money; we're going to drop the price.

09:10 20 So Borland is going to sell it for \$49.
09:10 21 If you take a half percent of \$49, that would be 25
09:10 22 cents.

09:10 23 Q. Did you actually look at some of the prices
09:10 24 that Borland published? Was it only \$49?

09:10 25 A. No. That was what they wanted to charge the

09:10 1 day they got the product. Of course, they had trouble
09:10 2 selling it, too, and so they cut the price down to \$39,
09:10 3 and then it eventually it became one of these things
09:10 4 they just gave away, like buy some other product and
09:10 5 we'll give you Dashboard free.

09:10 6 So it went from 49 to 39 and eventually,
09:11 7 at least at times, we know it was given away for
09:11 8 nothing.

09:11 9 Q. So did you try and calculate a per-unit rate of
09:11 10 the HP license based on the information in evidence that
09:11 11 you had?

09:11 12 A. Well, if you were going to assume an average
09:11 13 price, knowing that it was never any more than 50 and it
09:11 14 could be as low as 0, and they actually did sell it for
09:11 15 40, for the purposes of figuring out what Mr. Gemini
09:11 16 ought to have done, I said, let's use \$40 as the average
09:11 17 price.

09:11 18 Q. And then did you come up with a per-unit rate?

09:11 19 A. Yes. And so if you took a half a percent,
09:11 20 which we agreed was the actual effective royalty rate in
09:11 21 the real world, times this 40-dollar price, a half a
09:11 22 percent of \$40 is 20 cents per unit.

09:11 23 Q. So you think that if you're looking at the HP
09:11 24 license, it would be 20 cents per unit, not 99 cents per
09:11 25 unit; is that right?

09:11 1 A. Well, no, because then you've got all the
09:11 2 adjustments that you've got to make, which is what
09:11 3 Mr. Gemini also didn't do.

09:11 4 Q. Okay. What kind of adjustments?

09:12 5 A. Well, this was the list of seven things that I
09:12 6 disregarded, because I wanted to make sure that I
09:12 7 compensated the patentees fairly, but Mr. Gemini should
09:12 8 have looked at at least some of these and tried to
09:12 9 adjust his rate; otherwise, I think he's overreaching.

09:12 10 So, for example, Mr. Gemini didn't take
09:12 11 into account the fact that prices have fallen over time.

09:12 12 Q. Did you look at any statistics to determine how
09:12 13 much software prices had fallen?

09:12 14 A. Yes. Software prices fell about 26 percent
09:12 15 from the time that HP negotiated their license to the
09:12 16 time that these parties would have sat down to bargain.
09:12 17 And so if you reduce that 20 cents by the same amount,
09:12 18 it would take it down to about 15 cents.

09:12 19 Q. Do you recall I asked Mr. Gemini some questions
09:12 20 about usage and a survey, 38 percent? Remember that?

09:12 21 A. Yes.

09:12 22 Q. Did Mr. Gemini take that into account?

09:12 23 A. Well, no, he disregarded that. Mr. Gemini had
09:12 24 a survey which the -- it was a survey about something
09:12 25 called virtualization. Virtualization has nothing to do

09:13 1 actually with the workspace switching feature, but that
09:13 2 survey used a figure of 38-percent usage.

09:13 3 I think it's wrong. It has nothing to do
09:13 4 with anything. But if you were going to use that
09:13 5 figure, then you should adjust your royalty rate by the
09:13 6 share of people that actually use the invention. And so
09:13 7 you should take that royalty rate down by 38 percent.
09:13 8 That would take it from 15 cents down to about 5 cents.

09:13 9 Q. Okay. And what do you do? You're at 5 cents.
09:13 10 Do you stop?

09:13 11 A. Well, no. Then we still have the fact that the
09:13 12 HP -- we wanted to adjust for any uncertainty about
09:13 13 litigation. I'm going to give the benefit to the
09:13 14 Plaintiffs, the benefit of every doubt. And so we're
09:13 15 going to multiply that number back up to 1.72 again.

09:13 16 So when all is said and done and you make
09:13 17 all these adjustments, you get a figure of about 9.6
09:13 18 cents per unit.

09:13 19 Q. So that's what you think the effective per-unit
09:13 20 royalty would be for HP, 9.6 cents per unit?

09:13 21 A. Again, if you were doing it Mr. Gemini's way,
09:13 22 okay? It's not just what you pay; it's how you pay it.

09:14 23 And so you shouldn't be paying it on a
09:14 24 per-unit basis, but if you were doing it that way, 9.6
09:14 25 cents is the number you'd come up with.

09:14 1 Q. Now, what about the Central Point license very
09:14 2 briefly?

09:14 3 A. Yeah. And so if you did the same thing with
09:14 4 Central Point and go through all the adjustments we just
09:14 5 talked about, that would be a little bit larger number,
09:14 6 and that would be about 12 cents.

09:14 7 Q. Okay. What about Apple, did you take a look at
09:14 8 Apple at all?

09:14 9 A. Yes.

09:14 10 Q. Okay. What did you look at?

09:14 11 A. Well, remember, Apple is structured as a
09:14 12 lump-sum license. And so what you want to do is make
09:14 13 sure that -- you want to -- again, if you're going to
09:14 14 think about per-unit terms, if you're going to try to
09:14 15 convert that lump sum into a pay-as-you-go license, you
09:14 16 need to figure out how many units Apple actually paid
09:14 17 for.

09:14 18 Q. Okay. And did you do an analysis?

09:14 19 A. Yeah. I think we've got the illustration of
09:14 20 the numbers for the jury to follow. You can see the
09:14 21 math here.

09:14 22 THE COURT: Mr. Vickrey?

09:14 23 MR. VICKREY: Same objection. Perhaps a
09:14 24 sidebar, Your Honor?

09:14 25 (Bench conference.)

09:15 1 MR. VICKREY: This is back six years, that
09:15 2 they can't get -- Your Honor told us -- said yesterday
09:15 3 that if they do this, you were going to say it doesn't
09:15 4 include sales, in the jury instructions. They just did
09:15 5 it.

09:15 6 MR. REITER: I disagree. No, we talked
09:15 7 about closing and I disagree. Mr. Gemini was able to
09:15 8 present his evidence his way. If he wants to
09:15 9 cross-examine Dr. Putnam on this issue, I think he
09:15 10 should be permitted. We are not going to argue sales to
09:15 11 the jury.

09:15 12 MR. VICKREY: It's on that chart.

09:15 13 THE COURT: I think in our discussion I
09:15 14 said that if that was argued in closing, I would make an
09:15 15 addition to my jury instructions, and I will.

09:15 16 MR. VICKREY: Then it's 403.

09:15 17 THE COURT: But in terms of what they can
09:15 18 present, I think I'm allowing both parties to present
09:15 19 their theories pretty openly. I don't think I
09:16 20 restricted Mr. Gemini, and I'm not going to restrict
09:16 21 Mr. Putnam either.

09:16 22 Thank you.

09:16 23 (Bench conference concluded.)

09:16 24 MR. REITER: If we could get the chart
09:16 25 back up.

09:16 1 Q. (By Mr. Reiter) Now, what does this show,
09:16 2 briefly?

09:16 3 A. Everybody loves math as much as I do, and so I
09:16 4 thought I'd just give you a chance to all go through it
09:16 5 with me.

09:16 6 And so what we have is, we're trying to
09:16 7 figure out what did Apple pay on a per-unit basis, okay?
09:16 8 So we can all do it together. Apple paid 1.25 million
09:16 9 in their license, okay? I went back and I looked at
09:16 10 Apple's annual reports from 2001 to 2008 to see how many
09:16 11 units worldwide of Macintosh computers they actually
09:16 12 sold. And that's about 39 million units.

09:16 13 Q. Why worldwide?

09:16 14 A. Because the Apple license agreement is a
09:16 15 worldwide license agreement.

09:16 16 Q. Okay. Go on.

09:17 17 A. And so on a per-unit basis, that works out to
09:17 18 3.2 cents. That's what the third line is, the effective
09:17 19 royalty rate per unit.

09:17 20 Now, remember, there was litigation
09:17 21 involved in the Apple case, and so we want to remove the
09:17 22 effects of -- any litigation discount that the parties
09:17 23 might have agreed to. So that's going to multiply by
09:17 24 1.72. That's takes it up to about 5-1/2 cents adjusted
09:17 25 per unit from the Apple agreement.

09:17 1 Q. I think we're getting ahead of ourselves, but
09:17 2 you went ahead and multiplied it out times the base to
09:17 3 get a damages number; is that right?

09:17 4 A. Sure. We were talking about the rate, and
09:17 5 so -- but just -- because this chart shows the whole
09:17 6 thing, I might as well just get to the bottom line.

09:17 7 So if you actually look at the data that
09:17 8 Red Hat -- I just did it for Red Hat here -- that Red
09:17 9 Hat's provided on what's called the GNOME package, which
09:17 10 is the package that contains the workspace switching
09:18 11 feature we've been talking about, there was about 1 --
09:18 12 almost 1.4 million units that are in the United States
09:18 13 that contain that feature.

09:18 14 1.4 million units at 5-1/2 cents per unit
09:18 15 works out to about \$76,000.

09:18 16 Q. Did you also kind of just look at -- I don't
09:18 17 think we have a chart for this -- Apple, if you only
09:18 18 talked about from the time the license was executed?

09:18 19 A. Sure. So let's suppose that you couldn't go
09:18 20 back in time six years, okay? And Apple was only paying
09:18 21 for the right to sell its product going forward, okay?

09:18 22 In that case, it would be many fewer
09:18 23 units. And so the chart would look exactly the same
09:18 24 except the second line, instead of being licensed units
09:18 25 for 2001 through 2008, it would be licensed units for

09:18 1 2007 to 2008, the date of the license forward.

09:18 2 Q. What did that number, adjusted royalty rate,
09:19 3 turn out to be?

09:19 4 A. It works out to, I think, 14 -- you get the
09:19 5 bottom line, it's about 14 cents. And the very bottom
09:19 6 line, the payment is about \$218,000. So it could be as
09:19 7 high as that, if that's how you interpreted the Apple
09:19 8 license.

09:19 9 Q. Okay. Let's go on to the SGI license.

09:19 10 A. Okay.

09:19 11 Q. Now, did Mr. Gemini use that license?

09:19 12 A. No.

09:19 13 Q. Is it possible or did you have enough
09:19 14 information to compute a per-unit royalty on the SGI
09:19 15 license?

09:19 16 A. No, there's just not enough information to
09:19 17 figure out the number of units that SGI actually sold.

09:19 18 Q. Okay. So what did you do with the SGI license?

09:19 19 A. Well, the SGI license -- it's sort of is what
09:19 20 it is. They paid \$95,000 and they got to sell as many
09:19 21 units as they wanted. That was the deal.

09:19 22 Q. Now, let's turn to the royalty base, and that's
09:19 23 the number of units that need to be paid for; is that
09:19 24 right?

09:19 25 A. Yes.

09:19 1 Q. Okay. Do you agree with the way Mr. Gemini
09:20 2 calculated the base?

09:20 3 A. No.

09:20 4 Q. Okay. Why not?

09:20 5 A. Well, the jury's already heard at length that
09:20 6 the first problem is that the number of IP addresses,
09:20 7 which is the number of addresses of computers in the
09:20 8 world, bears no relationship to the number of users or
09:20 9 units that are actually using the software, which is
09:20 10 something that the -- neither Red Hat nor Novell
09:20 11 actually tracks.

09:20 12 Q. So let's start with Novell. Okay. What did
09:20 13 Mr. Gemini use?

09:20 14 A. Well, for Novell, Novell actually produced
09:20 15 their unique IP addresses, and so whatever this means,
09:20 16 they counted the number of addresses in the United
09:20 17 States, and they counted the number of addresses
09:20 18 worldwide.

09:20 19 And then Mr. Gemini used the number of
09:20 20 U.S. addresses as his royalty base; that's the number of
09:20 21 units that he says should be paid for on this
09:20 22 pay-as-you-go basis.

09:20 23 Q. Do you recall what that number was?

09:20 24 A. About 1.1 million.

09:21 25 Q. 1.8 million?

09:21 1 A. 1.8 million. I'm sorry. 1.8 million. Yes.

09:21 2 Q. Okay. And that's of openSUSE?

09:21 3 A. Yes. That's for the -- for the R&D project,
09:21 4 the non-revenue-generating part of Novell.

09:21 5 Q. Okay. Now, let's turn to Red Hat. What did
09:21 6 Mr. Gemini do?

09:21 7 A. Well, for Red Hat, Red Hat produced the same
09:21 8 information. They produced the worldwide number of IP
09:21 9 addresses, and then they produced the share of those
09:21 10 addresses that are in the U.S. or the exact number, not
09:21 11 the --

09:21 12 MR. REITER: Can we pull up DX904, please?

13 Q. (By Mr. Reiter) What are you talking
09:21 14 about here?

09:21 15 A. Yes. If you look at the bottom line, that's
09:21 16 the number we actually care about. So this is for the
09:21 17 14-month period covered by the patent. It's not a very
09:21 18 friendly -- easy-to-read number, but the number on the
09:21 19 left is the number of IP addresses, whatever that means,
09:22 20 in the United States. And the number on the right is
09:22 21 the number of IP addresses outside the United States.

09:22 22 So if you add them together, that's
09:22 23 worldwide. So just to read the numbers so everyone
09:22 24 knows them, it's 1,537,441 in the United States and
09:22 25 8,253,509 million outside the United States.

09:22 1 Q. What did Mr. Gemini do?

09:22 2 MR. REITER: If we could put up PX321,
09:22 3 Schedule 1, please.

09:22 4 A. So Mr. Gemini ignored all that. He didn't do
09:22 5 the same thing that he did with Novell. He went back
09:22 6 and computed the number of IP addresses, not from what
09:22 7 Red Hat actually said but from an article that he
09:23 8 got in -- that he found on the internet somewhere.

09:23 9 MR. REITER: The last page, Schedule 1,
09:23 10 not Paragraph 1. I'm sorry. There we go.

09:21 11 Q. (By Mr. Reiter) So he had the Fedora units at
09:23 12 6.7 million. Is that a worldwide number?

09:23 13 A. Yes.

09:23 14 Q. Okay. And he had the RHEL units at 570,000?

09:23 15 A. Yes.

09:23 16 Q. That's a worldwide number?

09:23 17 A. Yes.

09:23 18 Q. And he added those up, and then what did he do
09:23 19 to account for just the U.S.?

09:23 20 A. Well, you can see there his adjustments. He's
09:23 21 got about 7.2 million, and then he -- of course, these
09:23 22 are U.S. patents, and so we have to get the U.S. share,
09:23 23 and he multiplies it by 55 percent.

09:23 24 But instead of using the actual U.S.
09:23 25 numbers, which Red Hat provided, he just said, well,

09:23 1 let's take RHEL, which is the part of Red Hat that
09:23 2 actually makes money, and let's look at the share of
09:23 3 RHEL revenues that are attributable to the U.S. and
09:24 4 let's multiply that. And that's 55 percent, because
09:24 5 most of the money you make -- because the U.S. is a
09:24 6 wealthy country, most of the money you make on this
09:24 7 comes from the U.S. and so let's apply that to the
09:24 8 worldwide share of all the IP addresses, and that gives
09:24 9 him about 4 million.

09:24 10 Q. Does that revenue number have anything to do
09:24 11 with Fedora?

09:24 12 A. No. Fedora doesn't make revenue. There's no
09:24 13 revenue associated with it, and it has nothing to do
09:24 14 with the IP addresses associated with Fedora. The two
09:24 15 concepts are completely unrelated.

09:24 16 Q. Do you believe that it's appropriate to take
09:24 17 the revenue -- the revenue information or percentage and
09:24 18 apply it to Fedora?

09:24 19 A. Well, it's not appropriate in general, and it's
09:24 20 particularly not appropriate when you know the true
09:24 21 number. Red Hat has provided the true number. If you
09:24 22 actually look at what the number is based on the figures
09:24 23 that Red Hat provided, the true number is about 15
09:24 24 percent, not 55 percent.

09:24 25 So you know for certain -- you know for

09:24 1 certain -- and this is actually important -- that if you
09:25 2 were to use Mr. Gemini's numbers, you're going to be
09:25 3 bringing in IP addresses from outside the United States
09:25 4 and asking the Defendants to pay damages on them as
09:25 5 though they were inside the United States. And that's
09:25 6 just flat wrong.

09:25 7 Q. Okay. Let's talk about what you did when you
09:25 8 borrowed Mr. Gemini's analysis.

09:25 9 MR. REITER: If we could put up DX936,
09:25 10 please, Page 45.

09:25 11 Q. (By Mr. Reiter) And do you know what this is?

09:25 12 A. Yes. This is one of the -- this is the second
09:25 13 of the two reports that I filed in this case.

09:25 14 Q. Okay.

09:25 15 MR. REITER: So if we could highlight or
09:25 16 zoom in on the 106(a) paragraph.

09:25 17 Q. (By Mr. Reiter) So could you explain what this
09:25 18 is?

09:25 19 A. Yes. So unlike Mr. Gemini, I took the actual
09:25 20 numbers that Red Hat used. There's -- remember those
09:25 21 two numbers we talked about earlier, the 1.5 million and
09:26 22 the 8.2 million, if you add those together, it comes out
09:26 23 to about 9.79 million units of Fedora, or it's called
09:26 24 downloads, but what we really mean is these are the IP
09:26 25 addresses for Fedora.

09:26 1 And so what that means is that the U.S.
09:26 2 portion is about 15.7 percent. That's for Fedora. And
09:26 3 then for RHEL, I just -- since we're trying to correct
09:26 4 Mr. Gemini and get to a number that he ought to have
09:26 5 gotten to, he said there were 570,000 worldwide RHEL
09:26 6 units. And for RHEL, I did follow his procedure and
09:26 7 multiplied by 55 percent.

09:26 8 Q. And why did you do that for the RHEL?

09:26 9 A. Because in this case if you got -- the only --
09:26 10 they don't track IP addresses for RHEL, and so the only
09:26 11 thing you've got is revenues. And so you're trying to
09:26 12 figure out -- you've got worldwide units and you want to
09:26 13 figure out the U.S. portion, and the only way to
09:26 14 allocate the U.S. portion is based on the U.S. money.

09:27 15 And so for RHEL, which generates money, it
09:27 16 makes more sense at least to look at the share of those
09:27 17 units that are proportional to U.S. revenue.

09:27 18 Q. So RHEL generates revenue; Fedora does not; is
09:27 19 that right?

09:27 20 A. That's exactly right.

09:27 21 Q. So that's why it's okay to use the 55 percent
09:27 22 for RHEL?

09:27 23 A. It's the best you can -- I mean, frankly, we're
09:27 24 in Alice in Wonderland here, but if you're going to do
09:27 25 that, this is the best you can do.

09:27 1 Q. Okay. Let's get to your conclusion.

09:27 2 MR. REITER: If we could go to Page 46,
09:27 3 please, and zoom in on Paragraph 110.

09:27 4 Q. (By Mr. Reiter) Now, did you do anything else
09:27 5 to account for the base?

09:27 6 A. Yes, a lot of adjustments in this case. The
09:27 7 only other adjustment is that -- remember, we talked
09:27 8 about this earlier. The -- there's a particular package
09:27 9 that has the accused feature in it. It's called GNOME.

09:28 10 And so for Red Hat, about 75 percent --
09:28 11 the best evidence is about 75 percent of these units had
09:28 12 GNOME installed. For Novell, it's about 37 percent.
09:28 13 And so you've got to take those numbers down from about
09:28 14 1.8 million down, in the case of Red Hat, to about 1.4
09:28 15 million; and in the case of Novell, a little
09:28 16 less 500,000.

09:28 17 Q. Do you recall if there was a typo in
09:28 18 Paragraph B?

09:28 19 A. Oh, actually, yes. I didn't catch that. I'm
09:28 20 sorry. I said 37 percent, and it should have been --
09:28 21 the math is right, as I recall. It should be 27
09:28 22 percent, .27 for Novell.

09:28 23 Q. Okay. Now, is that what you think the
09:28 24 appropriate royalty base would be for Red Hat and
09:28 25 Novell -- 1.4 million units and 484,000 for Novell?

09:28 1 A. If you're going to follow Mr. Gemini's
09:28 2 procedures, then this is the best -- this would have
09:28 3 been the way you should have done it.

09:28 4 Q. Okay. Do you agree with that process, that
09:29 5 methodology?

09:29 6 A. No. As I've said, we have now made -- you
09:29 7 know, it's not what you pay; it's how you pay it. We
09:29 8 should be paying on a lump-sum basis. This is only if
09:29 9 you believed that you were going to pay on a running
09:29 10 royalty.

09:29 11 Q. Okay. So now you have to take this base and
09:29 12 multiply it by a rate?

09:29 13 A. Yes; that's right.

09:29 14 MR. REITER: If we could go to the next
09:29 15 paragraph, 111.

09:29 16 Q. (By Mr. Reiter) Did you do that?

09:29 17 A. Yes.

09:29 18 Q. So what did you come up with?

09:29 19 A. So remember, we said that we had various sort
09:29 20 of per-unit rates that you could have come up with in
09:29 21 this case. We had about 5-1/2 cents from the Apple
09:29 22 agreement, 9-1/2 cents from the HP agreement, 12 cents
09:29 23 from the Central Point agreement.

09:29 24 So we can all do the math. I picked the
09:29 25 middle one, which is 9-1/2 cents. If you do this, if

09:29 1 you follow Mr. Gemini's logic and use the right numbers
09:29 2 and correct all the mistakes, you'd get to the bottom
09:29 3 line. If you were doing it that way, you would get a
09:30 4 number of about 133,000 for Red Hat and about 46,000 for
09:30 5 Novell.

09:30 6 Q. So this would be what you think, using
09:30 7 Mr. Gemini's analysis, the appropriate measure of
09:30 8 damages for Red Hat and Novell?

09:30 9 A. Yes. In Mr. Gemini's world, using the right
09:30 10 numbers, this is what you'd get to as a bottom line.

09:30 11 Q. Okay. So wrapping everything up, Dr. Putnam,
09:30 12 what is your ultimate opinion here, if the patents were
09:30 13 to be found valid and infringed?

09:30 14 A. If the folks on the jury find the patents valid
09:30 15 and infringed, in my opinion, the number should be a
09:30 16 lump-sum payment, one lump-sum payment of \$172,000 for
09:30 17 Red Hat and \$17,200 for Novell.

09:30 18 Q. And I just want to be clear. You're not saying
09:30 19 that you have an opinion about whether the patents are
09:30 20 valid or infringed, do you?

09:30 21 A. No. This is only if the car is for sale is the
09:30 22 appraiser's opinion relevant.

09:30 23 MR. REITER: Pass the witness, Your Honor.

09:30 24 MR. VICKREY: Your Honor, I have a few
09:31 25 questions.

09:31 1 THE COURT: Thank you, Mr. Vickrey. You
09:31 2 may proceed.

09:31 3 CROSS-EXAMINATION

09:31 4 BY MR. VICKREY:

09:31 5 Q. Good morning, Dr. Putnam.

09:31 6 A. Good morning, Mr. Vickrey.

09:31 7 Q. We met last week?

09:31 8 A. Yes.

09:31 9 Q. Sir, did I hear you say that there's a
09:31 10 correlation between revenue and how you calculate
09:31 11 damages in this case, like between Red Hat and Novell?

09:31 12 A. There's some evidence that you would scale the
09:31 13 size of the payment based on revenue. For example, the
09:31 14 Apple agreement is larger than other agreements that the
09:32 15 parties -- that the Plaintiffs have negotiated.

09:32 16 Q. I'm not talking about Apple. Let's just talk
09:32 17 about Red Hat and Novell.

09:32 18 Did I hear you tell the jury that what you
09:32 19 do to figure out the relative size of the damage awards
09:32 20 is you look at revenue of Red Hat against revenue of
09:32 21 Novell? And that's what you did?

09:32 22 A. Frankly, it's an open question about whether
09:32 23 you should adjust for revenue.

09:32 24 What we've seen is that if you do look at
09:32 25 revenue, which we know is important since that's how

09:32 1 companies make money, you would adjust based on revenue.
09:32 2 And if you did that, the factor would be about 10
09:32 3 percent for Novell, yes.

09:32 4 Q. I'm not talking about make-believe. That's
09:32 5 what you actually told the jury you did?

09:32 6 A. Yes, that is right.

09:32 7 Q. So you used the relative revenue base to
09:32 8 calculate the damages between Red Hat and Novell,
09:32 9 correct?

09:32 10 A. Once you've gotten to a lump-sum figure, yes.

09:32 11 Q. Okay. Did I hear you say that Red Hat and
09:32 12 Novell had actually produced usage figures in this case?

09:33 13 A. I don't think you did, because they haven't.

09:33 14 Q. Well, I think I heard you say, well, if you
09:33 15 look at what Red Hat produced about use and what Novell
09:33 16 produced about use, this is what you get.

09:33 17 A. Well, if by use you mean IP addresses, then
09:33 18 they both produced information about IP addresses;
09:33 19 that's true.

09:33 20 Q. What did Novell produce? You heard Mr. Gemini
09:33 21 say they didn't produce anything, so he had to go out
09:33 22 and find it on the internet, right?

09:33 23 A. Well, if I -- if I understand the genesis
09:33 24 correctly, he downloaded it from Novell's website.

09:33 25 Q. But Novell didn't produce a thing, right?

09:33 1 A. Well, if you're talking about as a matter of
09:33 2 legal procedure, I'm not sure exactly how Mr. Gemini got
09:33 3 the numbers. They're Novell's numbers and Novell stands
09:33 4 by them.

09:33 5 Q. To this day, have you seen anything that Novell
09:33 6 has produced about the number of users of even its
09:34 7 commercial product, its enterprise product, SLED, not
09:34 8 openSUSE? Have you seen a single document produced by
09:34 9 Novell?

09:34 10 A. I think the testimony is clear that they don't
09:34 11 track those numbers. The answer to your question is,
09:34 12 no, I haven't seen them, because they don't exist.

09:34 13 Q. Not even internet addresses, right?

09:34 14 A. I don't know what Novell -- how they use them
09:34 15 internally.

09:34 16 Q. Well, you haven't seen any even IP addresses
09:34 17 for the use of its commercial product, correct?

09:34 18 A. That is true, yes.

09:34 19 Q. They didn't give it to you?

09:34 20 A. Yes. The addresses I've seen are for openSUSE
09:34 21 only; that's right.

09:34 22 Q. And you didn't ask for them, right?

09:34 23 A. I don't think they exist.

09:34 24 Q. Did you ask?

09:34 25 A. I was told they did not exist.

09:34 1 Q. Who told you that?

09:34 2 A. I'm sure it was counsel for Novell or -- yeah.

09:34 3 Q. Does it strike you as odd that they would --
09:35 4 they would keep IP addresses for the free stuff they
09:35 5 give away but not keep it for the stuff -- their
09:35 6 enterprise product that they actually make money from?

09:35 7 A. No.

09:35 8 Q. That's perfectly normal to you?

09:35 9 A. They don't track -- IP addresses are not users;
09:35 10 they aren't customers; they don't have anything to do
09:35 11 with the actual number of copies of the software. We're
09:35 12 using something we know is irrelevant, because it's the
09:35 13 only thing available to count.

09:35 14 Q. Sir, you've heard sworn testimony in this case
09:35 15 by deposition that Novell has two different per-unit
09:35 16 licenses: One's Via and one's for MPEG, right?

09:35 17 A. Yes.

09:35 18 Q. And how in the world could they keep track of
09:35 19 the royalties for those running royalty licenses,
09:35 20 including the MPEG license, not the one with the cap,
09:35 21 the other one, if they don't track it? Strike you as
09:35 22 odd?

09:35 23 A. Well, I -- first of all, I haven't seen the
09:36 24 terms of the license, so I don't know exactly the number
09:36 25 that's being tracked. Obviously, they're able to

09:36 1 perform under the agreement, and obviously the agreement
09:36 2 has got a cap on it, and so functionally, what happens
09:36 3 is that they don't track. They just write a check every
09:36 4 year for the same amount of money, because they hit the
09:36 5 cap.

09:36 6 Q. All right. I want to briefly revisit your
09:36 7 background, sir. Courts have rejected your opinions in
09:36 8 the past?

09:36 9 A. I've had a judge disagree with me; that's true.

09:36 10 Q. All right. It's more than one, though?

09:36 11 A. No. That's not true.

09:36 12 Q. Let's talk about the Beidleman case. Now, in
09:36 13 the Beidleman case, the judge in -- the federal judge in
09:36 14 the Denver court excluded your opinions, refused to let
09:36 15 you testify, correct?

09:36 16 A. Yes, that is true. But that's based on
09:36 17 exclusion of the damages theory offered by the
09:37 18 defendants.

09:37 19 MR. VICKREY: Your Honor --

09:37 20 Q. (By Mr. Vickrey) Dr. Putnam, the judge excluded
09:37 21 your testimony because it would lead to an incorrect
09:37 22 assessment of allowable damages, correct?

09:37 23 A. It's true by definition, sure.

09:37 24 Q. All right. Now, let's look at what you said
09:37 25 yesterday when Red Hat's lawyers questioned you about

09:37 1 it.

09:37 2 And you knew that I was going to ask you
09:37 3 about this, because last week I took your deposition,
09:37 4 and I asked you about it, right?

09:37 5 A. That's true.

09:37 6 Q. And so you and Red Hat's lawyers discussed how
09:37 7 you were going to respond to it yesterday, correct?

09:37 8 A. We certainly did discuss that.

09:37 9 Q. Yeah. And this is what you came up with: I
09:37 10 worked on a copyright case once where the lawyers
09:37 11 actually wanted to offer a particular theory of defense,
09:37 12 and I authored a report for them. So the lawyers wanted
09:37 13 to put something in front of the Court and the jury and
09:38 14 you decided that, okay, I'll author it for you, right?

09:38 15 Right?

09:38 16 A. They asked me to write a report and I did, yes.

09:38 17 Q. No, but they said that they wanted to offer a
09:38 18 particular theory, so that's what you did. That's the
09:38 19 theory that you offered?

09:38 20 A. It's a question of whether the theory is
09:38 21 allowable as a matter of law, Mr. Vickrey.

09:38 22 Q. Sir, the lawyers wanted to offer a particular
09:38 23 theory, so you came up with an expert opinion adopting
09:38 24 that theory, correct?

09:38 25 A. Under the assumption that the theory was

09:38 1 admissible, yes.

09:38 2 Q. And it wasn't admissible?

09:38 3 A. Yes; that's right.

09:38 4 Q. Now, let's talk about the -- another case. The
09:38 5 Paragon Trade Brands case. Remember that case, sir?

09:38 6 A. Yes.

09:38 7 Q. And in that case, the federal court in Atlanta
09:38 8 rejected your opinions after a trial, right?

09:39 9 A. Yes. That was the bankruptcy court actually,
09:39 10 not the district court but the bankruptcy court.

09:39 11 Q. Well, it's a federal court in Atlanta?

09:39 12 A. Yes, that's right.

09:39 13 Q. It was after the trial, the Court heard your
09:39 14 testimony, right?

09:39 15 A. Yes.

09:39 16 Q. And the Court rejected your testimony?

09:39 17 A. The bankruptcy court did reject it; that's
09:39 18 true.

09:39 19 Q. And let's -- and you knew I was going to ask
09:39 20 you about that, and you talked about that with Red Hat's
09:39 21 lawyers, right?

09:39 22 A. Of course.

09:39 23 Q. Let's look at what you said yesterday about
09:39 24 that. Here you're suggesting that the bankruptcy court
09:39 25 was reversed about the findings she made about your

09:39 1 testimony, right?

09:39 2 A. I'm sure you know as a lawyer, Mr. Vickrey,
09:40 3 that the case was appealed on the merits, and the
09:40 4 judgment was reversed on the merits without -- and so
09:40 5 that rendered the whole opinion about -- the whole trial
09:40 6 about damages completely moot.

09:40 7 Q. In other words, on the appeal, there was
09:40 8 nothing said about whether the judge was right or wrong
09:40 9 about how your testimony was -- let me find a quote --
09:40 10 contradicted by the evidence and unpersuasive. There
09:40 11 was nothing in the appeal about that, correct?

09:40 12 A. Yes, of course the Court of Appeal didn't have
09:40 13 to reach that question.

09:40 14 Q. And now I want to talk about your methodology
09:40 15 in this case. What you did was to set out, at the
09:41 16 direction of Red Hat's lawyers, to come up with the
09:41 17 lowest possible damages in this case, correct?

09:41 18 A. That statement is completely false.

09:41 19 Q. All right. It's your opinion that the damages
09:41 20 for Red Hat would be \$172,000, right?

09:41 21 A. Yes.

09:41 22 Q. Fair to say that that's less than what your
09:41 23 firm stands to be paid in this case?

09:41 24 A. I think when all is said and done, my firm will
09:41 25 probably collect more than 172,000; that's true.

09:41 1 Q. And your hourly rate alone is \$699?

09:41 2 A. 675.

09:41 3 Q. If someone is setting out to come up with the
09:41 4 lower possible damages, you're going to cherry-pick from
09:41 5 the evidence, seize on something that helps you, and
09:41 6 reject or discount everything else, right?

09:41 7 A. Well, the premise is false; the conclusion is
09:41 8 false, also. I didn't set out to find the lowest
09:42 9 number, and I didn't cherry-pick.

10 Q. Sir, that's not what I asked you?

09:42 11 THE COURT: I think his answer was fair.
09:42 12 You may proceed, Mr. Vickrey.

09:42 13 MR. VICKREY: Okay.

09:42 14 Q. (By Mr. Vickrey) Let's look at some of the
09:42 15 things you actually did in coming up with your opinion
09:42 16 that this patented feature is trivial.

09:42 17 By the way, those are your words, not
09:42 18 mine, trivial?

09:42 19 A. We were talking about as a share of the total
09:42 20 lines of code in the product, and I think that most
09:42 21 people would agree that 3/1000 of a percent is a trivial
09:42 22 number.

09:42 23 Q. You and the Defendants' lawyers have shown the
09:42 24 jury a lot of slides with new statements and opinions
09:42 25 which can't be found in the two expert reports you

09:42 1 submitted in this case, correct?

09:42 2 A. No, with one exception, and that's the Apple
09:42 3 agreement. And we put that in, because you asked me
09:42 4 about it in my deposition.

09:42 5 Q. All right. One of your -- you submitted two
09:42 6 reports in this case, sir?

09:42 7 A. That's right.

09:42 8 Q. And when was the second report?

09:42 9 A. I don't recall -- I don't recall the date.

09:43 10 Q. April 13?

09:43 11 A. That sounds right, yes.

09:43 12 Q. Okay. Now, one of the first things you
09:43 13 addressed in direct testimony, you applied something
09:43 14 called the nine-part test for running royalty, correct?

09:43 15 A. Yes.

09:43 16 MR. VICKREY: Kindly flash that up.

09:43 17 Q. (By Mr. Vickrey) The nine-part test for running
09:43 18 royalty, that's not found in any of your reports,
09:43 19 correct?

09:43 20 A. That's false. It should be -- it's in my
09:43 21 second report.

09:43 22 Q. The nine-part test?

09:43 23 A. Yes.

09:43 24 MR. VICKREY: May I approach, Your Honor?

09:44 25 THE COURT: Yes. Is there.

09:44 1 Q. (By Mr. Vickrey) Dr. Putnam, kindly direct me
09:44 2 to where I could find the nine-part test.

09:44 3 A. Mr. Vickrey, if you turn to Exhibit 16, which I
09:44 4 believe is seven pages from the end, this is essentially
09:44 5 a verbatim copy.

09:44 6 Q. Okay.

09:44 7 THE COURT: Could you hold that up for the
09:44 8 jury to see?

09:44 9 THE WITNESS: I'm sorry. This is -- you
09:45 10 can't read it probably, but you can see maybe on the
09:45 11 right-hand side here all of the -- all the -- no, sir.

09:45 12 MR. VICKREY: I agree with Dr. Putnam that
09:45 13 it is in Exhibit 16.

09:45 14 Q. (By Mr. Vickrey) But this is something that --
09:45 15 this test, can you find it in a case or an article or
09:45 16 anything like that?

09:45 17 A. No. It's not -- I mean -- no, I would say it's
09:45 18 not derived from a legal test. It's derived from the
09:45 19 facts in this case and underlying economics.

09:45 20 Q. In other words, this is a test you created for
09:45 21 this case?

09:45 22 A. It's true I've never applied this test before.
09:45 23 These -- I've never applied -- collected these nine
09:45 24 questions into one spot and asked them about -- applied
09:45 25 them to the facts of a particular case; that's true.

09:45 1 Q. Dr. Putnam, on direct examination, you
09:45 2 mentioned a license that Red Hat took that covered the
09:45 3 same products.

09:46 4 A. The accused products, yes.

09:46 5 Q. Including Fedora even though it was a free
09:46 6 product?

09:46 7 A. I believe -- I believe Fedora is also licensed
09:46 8 under the license, yes.

09:46 9 Q. And it was for U.S. patents, correct?

09:46 10 A. Yes.

09:46 11 Q. And what was the amount?

09:46 12 A. Around 4 million, I think.

09:46 13 Q. 4.25 million?

09:46 14 A. That sounds right.

09:46 15 Q. You mentioned on direct you had made a
09:46 16 statement not every copy infringes. You're aware that
09:46 17 one of the claims in the case is directed to every
09:46 18 single copy of the software that's distributed?

09:46 19 A. This is a liability question, Mr. Vickrey, and
09:46 20 my understanding is that a -- in order to infringe, you
09:46 21 have to have a display and a graphical user interface.
09:46 22 And my understanding is that's not characteristic of
09:47 23 every unit.

09:47 24 Q. Are you talking about the units that apply to
09:47 25 the servers?

09:47 1 A. Well, servers -- in general, not every server,
09:47 2 but servers in general don't have displays. Of those
09:47 3 that have displays, not every one has a graphical user
09:47 4 interface.

09:47 5 Q. Would you agree with me all the Fedora and
09:47 6 openSUSE products and the RHEL software products and the
09:47 7 SLED software products are accused of infringement?

09:47 8 A. I think that's a liability question. I
09:47 9 think --

09:47 10 Q. You don't know?

09:47 11 A. I don't get into liability.

09:47 12 Q. All right. And you sat here through the trial,
09:47 13 correct?

09:47 14 A. Good parts of it, yes.

09:47 15 Q. And you've heard the testimony that GNOME is
09:47 16 the default application?

09:47 17 A. For Red Hat, not Novell.

09:47 18 Q. All right. Now, it's your belief, is it not,
09:48 19 that a reasonable royalty calculation should be adjusted
09:48 20 to account for the probability that a patent is found
09:48 21 valid and infringed at trial, correct?

09:48 22 A. You should adjust the licenses that you find,
09:48 23 if there's evidence that those licenses were negotiated
09:48 24 over a patent that hasn't been found valid and
09:48 25 infringed; that's true.

09:48 1 Q. And you make that adjustment routinely, because
09:48 2 it's the right thing to do and because it's consistent
09:48 3 with the law, correct?

09:48 4 A. Yes.

09:48 5 Q. Now, according to your report and according to
09:48 6 your testimony, a good estimate of the parties'
09:48 7 expectations regarding probability of finding validity
09:48 8 and infringement is 57 percent?

09:48 9 A. I think I used 58, but yes.

09:48 10 Q. Okay, 58 percent. And the statistical
09:48 11 foundation for that 58-percent risk percentage was a
09:48 12 2000 article and a study by Judge Moore, correct?

09:48 13 A. Yes.

09:48 14 Q. And there have been more recent studies and
09:48 15 articles, correct?

09:49 16 A. Yes.

09:49 17 Q. There was the Sherry and Teece study showing
09:49 18 that the percentage would actually be 45 percent?

09:49 19 A. They said if you were summarizing the
09:49 20 literature that they found, they summarized it as 45 to
09:49 21 55 percent.

09:49 22 Q. All right. So if you took the mid-range,
09:49 23 that's 50 percent, which results in a two times
09:49 24 multiplier?

09:49 25 A. Your math is right, yes.

09:49 1 Q. Okay. And that study came out in 2004,
09:49 2 correct?

09:49 3 A. Yes.

09:49 4 Q. You didn't cite it in your reports?

09:49 5 A. I didn't cite the Sherry and Teece article, no,
09:49 6 that's right.

09:49 7 Q. And then there was the 2006 study in the AIPLA
09:49 8 Quarterly Journal, correct?

09:49 9 A. Yes. That's Janake's.

09:49 10 Q. That's the Janake article, and you were aware
09:49 11 of the article, correct?

09:49 12 A. Yes.

09:49 13 Q. And you didn't cite it in either of your
09:49 14 reports, correct?

09:49 15 A. I think Professor Janake's numbers are not
09:49 16 correct. He tried to do the right thing, and ended up
09:49 17 making a mistake along the way, and I think we need more
09:50 18 data before we can actually use that method.

09:50 19 Q. But my question was, you didn't cite it in
09:50 20 either of your reports?

09:50 21 A. I did not cite it for that reason, yes; that's
09:50 22 right.

09:50 23 Q. That study was peer-reviewed, was it not?

09:50 24 A. I actually don't know.

09:50 25 Q. All right.

09:50 1 MR. VICKREY: May I approach, Your Honor?

09:50 2 THE COURT: Yes.

09:50 3 THE WITNESS: Thank you.

09:50 4 MR. VICKREY: Your Honor may have one
09:50 5 already, but do you want one?

09:50 6 THE COURT: Go ahead. I've read it.

09:50 7 MR. VICKREY: All right.

09:50 8 Q. (By Mr. Vickrey) Here's the study, correct?

09:51 9 A. This is a copy of the study; that's right.

09:51 10 Q. Yeah. And just looking at the first page, does
09:51 11 that refresh your recollection that it was, in fact,
09:51 12 peer-reviewed?

09:51 13 A. I don't mean to dispute with you, Mr. Vickrey.
09:51 14 I just don't know what evidence you're pointing to.

09:51 15 Q. The footnote.

09:51 16 A. Well, if you mean that they think colleagues
09:51 17 who made comments on the manuscript, then that's true.
09:51 18 I interpret peer-reviewed to be a formal process by
09:51 19 which anonymous referees review the manuscript and pass
09:51 20 judgment on it. I don't know that that happened.

09:51 21 Q. All right. As far as you know, this is the
09:51 22 most recent study which sought to quantify litigation on
09:51 23 uncertainty, correct?

09:51 24 A. No.

09:51 25 Q. Is there another one?

09:51 1 A. Yes. I found one by PricewaterhouseCoopers,
09:51 2 which is an accounting firm.

09:52 3 Q. And in that PricewaterhouseCoopers study, they
09:52 4 found that a non-producing entity had a 29-percent rate,
09:52 5 correct?

09:52 6 A. That was their number for -- I recall that was
09:52 7 their number, yes.

09:52 8 Q. All right. But the AIPLA study actually
09:52 9 factored in summary judgment, correct?

09:52 10 A. Yeah. And that was one of the things I thought
09:52 11 actually Professor Janake deserved credit for trying to
09:52 12 do, and I wished that he had constructed his sample
09:52 13 differently. It's an important question.

09:52 14 Q. All right. And the prior study by Judge Moore
09:52 15 wasn't looking at summary judgment, correct? It was
09:52 16 just looking at wins at trial, correct?

09:52 17 A. I believe it restricted the sample to cases
09:52 18 that were disposed of at trial or on appeal; that's
09:52 19 right.

09:52 20 Q. And one of the reasons why the AIPLA study
09:52 21 comes to a different percentage is because the win rate
09:53 22 for defendants in summary judgment is higher, correct?

09:53 23 A. That is one of the reasons, yes.

09:53 24 Q. All right. And you yourself have explained
09:53 25 that an arm's length royalty agreed to in the course of

09:53 1 licensing negotiation is often insufficient to
09:53 2 compensate for infringement, correct?

09:53 3 A. Well, if you're referring to the article that I
09:53 4 published, then the answer is yes, because it doesn't
09:53 5 take into account the removal of uncertainty. But
09:53 6 obviously here, that's what I did.

09:53 7 Q. And you also made the comment that -- correct
09:53 8 me if I'm wrong -- that because of uncertainty, no
09:53 9 potential licensee would be willing to pay the full
09:53 10 economic value for the patented technology in the form
09:53 11 of a royalty, correct?

09:53 12 A. It's a reasonable assumption, sure.

09:54 13 Q. And -- but once the judge or a jury awards
09:54 14 damages, uncertainty regarding validity and infringement
09:54 15 have been resolved, right?

09:54 16 A. For the purposes of calculating damages, yes.

09:54 17 Q. All right. Now -- and that's because there's
09:54 18 actually been a finding by a court as opposed to the
09:54 19 parties voluntarily agreeing to something in a
09:54 20 settlement agreement, correct?

09:54 21 A. Yes.

09:54 22 Q. I want to talk a little bit about use, because
09:54 23 that's a factor in calculating a reasonable royalty,
09:54 24 correct?

09:54 25 A. Yes.

09:54 1 Q. Did you hear the testimony of Mr. Riveros about
09:54 2 how Red Hat keeps and archives surveys of their
09:54 3 customers about the use of features of its software?

09:54 4 A. I wasn't here, but that's consistent with my
09:55 5 understanding.

09:55 6 MR. VICKREY: Could I please have that?

09:55 7 Q. (By Mr. Vickrey) Did Red Hat produce to you the
09:55 8 surveys that it keeps?

09:55 9 A. No.

09:55 10 Q. Did you ask for them?

09:55 11 A. My understanding was, these are surveys for our
09:55 12 new features or features they're testing out. They want
09:55 13 to see whether to adopt them in their enterprise
09:55 14 product.

09:55 15 And so since the feature in question has
09:55 16 already been in the product since 1997, I don't think
09:55 17 that these features existed at that time -- I'm sorry --
09:55 18 these surveys existed at that time.

09:55 19 Q. All right. Do you know that for a fact, sir?

09:55 20 A. I don't know it for a fact, no, but I know for
09:55 21 a fact that Fedora didn't exist at that time.

09:55 22 Q. Well, Mr. Riveros doesn't work on Fedora. He
09:55 23 works on the enterprise product. He's talking about
09:56 24 features that Red Hat's customers talk about, not the
09:56 25 free Fedora software, right?

09:56 1 A. Well, without knowing the context, I'm not
09:56 2 really sure what these surveys refer to, so I don't want
09:56 3 to --

09:56 4 Q. All right.

09:56 5 A. I've never seen them, and so I don't want to
09:56 6 pretend that I know.

09:56 7 Q. All right. You heard Mr. Gemini testify that
09:56 8 because he didn't have surveys, he looked for evidence
09:56 9 of what industry analysts and actual users of the
09:56 10 infringing features said about it, correct?

09:56 11 A. He did say that.

09:56 12 Q. And I just want to briefly touch on some of the
09:56 13 things that he relied on.

09:56 14 MR. VICKREY: 285.

09:56 15 Q. (By Mr. Vickrey) The Mozilla article, you've
09:56 16 seen this, correct, sir?

09:56 17 A. Sure. This is -- the problem is, this is all
09:57 18 anecdotal evidence; it's one person's opinion. It's not
09:57 19 actually an industry survey. It's one guy thinks this
09:57 20 is useful.

09:57 21 Q. I agree with you that this is not a survey, but
09:57 22 this is one of the things Mr. Gemini found about what
09:57 23 people in the industry were saying about the feature,
09:57 24 correct?

09:57 25 A. He did find this, yes.

09:57 1 Q. Kindly turn to 278.

09:57 2 This was the article in PC World
09:57 3 identifying virtual workspaces as the top feature out of
09:57 4 20 that Windows ought to have?

09:57 5 A. You only read half of the title. And how to
09:57 6 get them.

09:57 7 Q. And how to get them.

09:57 8 A. The next page actually tells you how to get
09:57 9 them for free. We talked about this yesterday. I
09:57 10 downloaded it from the Microsoft website.

09:57 11 Q. Right. And you're aware Microsoft is licensed
09:57 12 under these very patents, correct?

09:57 13 A. That's my understanding, yes.

09:57 14 Q. All right. Kindly turn to page -- PX279.

09:58 15 This was another thing that Mr. Gemini --
09:58 16 another assessment of this feature that Mr. Gemini
09:58 17 relied on?

09:58 18 A. He did rely on this, yes.

09:58 19 Q. And there were others. I won't go through
09:58 20 them, but you saw all of them, correct?

09:58 21 A. I think he had one other article that referred
09:58 22 to it as a secret; that's right.

09:58 23 Q. But none of those are quoted in your reports?

09:58 24 A. Well, because they went -- what we're looking
09:58 25 for is some sort of quantitative estimate of -- for an

09:58 1 economist, what you care about is what's the economic
09:58 2 impact of this, and not the fact that some people think
09:58 3 it's valuable.

09:58 4 Anybody would conceive that some people
09:58 5 think it's valuable, but you're trying to figure out
09:58 6 what share of the total is that and how important is it
09:58 7 to their decision. And nothing Mr. Gemini cited tells
09:58 8 me about that.

09:58 9 MR. VICKREY: Kindly put up 936, Page 45.
09:59 10 Highlight that, please.

09:59 11 Q. (By Mr. Vickrey) Here -- this is from your
09:59 12 second report, correct?

09:59 13 A. Yes.

09:59 14 Q. Here you say that Red Hat determined there
09:59 15 existed about 9.8 million downloads during the period,
09:59 16 correct, the damages period?

09:59 17 A. Yes. And the word downloads there, I think, as
09:59 18 I explained, is meant to be unique IP addresses. But
09:59 19 with that qualification, yes.

09:59 20 Q. And let's -- and then you also address the RHEL
09:59 21 product, which is the commercial one?

09:59 22 A. Yes, the enterprise version.

09:59 23 Q. Now, you sat through at least part of the
09:59 24 trial, and you heard the evidence about IP addresses and
10:00 25 their accuracy in terms of using them for a barometer of

10:00 1 use, correct?

10:00 2 A. Well, I've heard about their accuracy and the
10:00 3 count of IP addresses is accurate. I've also heard the
10:00 4 testimony about how they are used as a barometer and
10:00 5 that they don't represent users.

10:00 6 So it's important to distinguish between
10:00 7 those two concepts of accuracy.

10:00 8 Q. That's because -- well, Red Hat has determined
10:00 9 two things, right? Its IP addresses could result in
10:00 10 overcounting and actually do, because the number of
10:00 11 unique IP addresses can be dynamic, so you can count a
10:00 12 single user multiple times.

10:00 13 A. That's one possible source of error, yes.

10:00 14 Q. But the other error in the methodology that
10:00 15 overcompensates for that is the fact that for corporate
10:01 16 and net users, the software can hit a unique IP address
10:01 17 and then fan out to multiple users, correct?

10:01 18 A. That's another source of error, yes; that's
10:01 19 true.

10:01 20 Q. But Red Hat said that when you measure those
10:01 21 two together, the second flaw significantly outweighs
10:01 22 the first, correct?

10:01 23 A. Well, if you're referring to the Frields
10:01 24 document, then that's what Mr. Frields said. I think
10:01 25 the testimony in court from Mr. Tiemann was Mr. Frields

10:01 1 was incorrect.

10:01 2 Q. All right. But -- and you also heard
10:01 3 Mr. Riveros say for the software they sell -- and they
10:01 4 have a lot of large companies, corporate companies in
10:01 5 the United States, correct?

10:01 6 A. They have a range of clients; that's true.

10:01 7 Q. And one of the packages they sell is the
10:01 8 so-called proxy system?

10:01 9 A. Okay.

10:02 10 Q. And were you here when Mr. Riveros explained
10:02 11 what would happen if that software hit, for example, my
10:02 12 law firm? You'd have a single IP address and it would
10:02 13 fan out to multiple users, and they wouldn't capture the
10:02 14 IP addresses, correct?

10:02 15 A. I wasn't here for Mr. Riveros' testimony.

10:02 16 Q. I apologize.

10:02 17 THE COURT: Mr. Vickrey, how much longer
10:02 18 do you think we'll go?

10:02 19 MR. VICKREY: Probably 20 minutes.

10:02 20 THE COURT: Then let's take a break.

10:02 21 MR. VICKREY: Thank you, Your Honor.

10:03 22 (Jury out.)

10:03 23 THE COURT: Would the attorneys
10:03 24 coordinating the lunch speak to Peggy? Jan can make
10:03 25 that connection, if you'd like.

10:03 1 (Recess.)

10:03 2 (Jury out.)

10:14 3 THE COURT: Gentlemen, I'm a little
10:14 4 worried about time here. It's not my job to tell you
10:14 5 how to do your question, but it's my judgment the jury
10:14 6 has heard of a lot of these things five and six times.
10:14 7 Let's see if we can focus on trying to finish rather
10:14 8 than trying to get in the last punch, all right?

10:14 9 MR. VICKREY: Yes, Your Honor.

10:14 10 MR. REITER: Yes, Your Honor.

10:14 11 THE COURT: Okay. Bring in the jury.

10:16 12 (Jury in.)

10:16 13 THE COURT: Please be seated.

10:16 14 Dr. Putnam, you remain under oath.

10:16 15 THE WITNESS: Yes, Your Honor.

10:16 16 THE COURT: Mr. Vickrey, you were
10:16 17 inquiring.

10:16 18 MR. VICKREY: Yes.

10:16 19 CROSS-EXAMINATION

10:16 20 BY MR. VICKREY:

10:16 21 Q. Dr. Putnam, I'm going to move this along as
10:16 22 quickly as possible. Kindly turn back to the PX936,
10:16 23 Page 45.

10:16 24 I want to turn briefly to Novell. The 1.8
10:16 25 million, would you agree with me that the 1.8 million

10:16 1 doesn't even take into account the -- the enterprise
10:16 2 users, in other words, the users of the commercial
10:16 3 product that Novell makes money off of in the U.S.?

10:16 4 A. That's my understanding.

10:16 5 Q. And would you agree with me that Novell's
10:16 6 revenue, since you've looked at the annual reports, is
10:16 7 roughly 50 -- 50 percent derived from U.S. sales?

10:17 8 A. For what products?

10:17 9 Q. For all of its products.

10:17 10 A. You mean as a company?

10:17 11 Q. Yes.

10:17 12 A. That would be surprising.

10:17 13 Q. All right.

10:17 14 MR. VICKREY: Tristan, kindly turn to
10:17 15 Exhibit 17 from the -- of the same report.

10:17 16 Q. (By Mr. Vickrey) Now, here's -- here we have
10:17 17 the culmination of your analysis of the lic -- license
10:17 18 agreements, correct?

10:17 19 A. Well, I wouldn't call it the culmination. It's
10:17 20 actually a comparison of the agreements of
10:17 21 Mr. Gemini's opinions, but okay.

10:17 22 Q. But, I mean, these are agreements that not just
10:17 23 Gemini analyzed, you analyzed them, as well, correct?

10:17 24 A. Yes.

10:17 25 Q. And that's because these agreements are

10:18 1 something important to look to in determining a
10:18 2 reasonable royalty, correct?

10:18 3 A. One should look at licenses to the
10:18 4 patents-in-suit, yes.

10:18 5 Q. All right. Let's -- let's just focus on HP.
10:18 6 Here you called this license a fixed license, correct?

10:18 7 A. Yes.

10:18 8 Q. In other words, lump sum?

10:18 9 A. That's right.

10:18 10 Q. And even though there is a running royalty
10:18 11 component in the license, you've taken that off the
10:18 12 table, right?

10:18 13 A. There's a contingency that evidently was never
10:18 14 fulfilled, that's true.

10:18 15 Q. You don't know one way or the other because we
10:18 16 have no sales information, correct?

10:18 17 A. I have no information -- I have not seen any
10:18 18 information that anybody paid under that contingency.

10:18 19 Q. But just so we're all clear, there's -- there's
10:18 20 actually a written -- something written in the license
10:18 21 agreement that calls out a one percent running royalty,
10:18 22 right?

10:18 23 A. The word one percent does appear in the license
10:18 24 agreement, that's true.

10:18 25 Q. And you understand that to be a running

10:19 1 royalty?

10:19 2 A. A contingent running royalty, yes, that's
10:19 3 right.

10:19 4 Q. All right. But let's take your assumption that
10:19 5 it's just \$110,000 lump sum payment to HP.

10:19 6 A. Okay.

10:19 7 Q. Because that's what you're saying here,
10:19 8 correct?

10:19 9 A. Yes.

10:19 10 Q. We know, do we not, from a later press release
10:19 11 from Borland that there was an estimate of 125,000 units
10:19 12 sold by HP?

10:19 13 A. Yes.

10:19 14 Q. And if we calculate -- if we apply the 110,000
10:19 15 to the 125,000 units, you get 88 -- 88 cents per unit
10:19 16 royalty?

10:19 17 A. I haven't done the math, but that sounds right.

10:19 18 Q. Okay. Now, let's take a look at the two lump
10:19 19 sum -- no -- Silicon Graphics and Apple, if we could
10:20 20 focus on those two, because these are the really meat
10:20 21 and potatoes of your analysis of the lump -- what you
10:20 22 consider to be the appropriate lump sum, correct?

10:20 23 A. Well, they're operating system licenses, and so
10:20 24 they're more comparable than the add-on utility licenses
10:20 25 for the reasons I've already said.

10:20 1 Q. All right. I'm going to address what you have
10:20 2 for sales down here in a minute and the accuracy of
10:20 3 that. But let's just assume that this is true. We're
10:20 4 looking at -- forgive the pun, but an apples-to-apples
10:20 5 comparison, correct?

10:20 6 A. I'm sorry. What are we comparing?

10:20 7 Q. Well, if we compare the SGI license to the
10:20 8 Apple license, you're considering both sales to be
10:20 9 equal, billion apiece, and they're both operating
10:20 10 systems, and they're both lump sum, right?

10:20 11 A. Well, they're both operating system, they're
10:20 12 both lump sum, and we did some back-of-the-envelope
10:21 13 calculation to try to figure out what portion of the
10:21 14 total sales of Silicon Graphics and Apple, which sell
10:21 15 hardware as well as software, what portion of those
10:21 16 sales was attributable to an operating system. And, you
10:21 17 know, back-of-the-envelope, a billion dollars is, you
10:21 18 know, as good a guess as any.

10:21 19 Q. But you've identified five characteristics,
10:21 20 five different characteristics for these licenses,
10:21 21 correct?

10:21 22 A. Yes.

10:21 23 Q. And four of the five are precisely identical
10:21 24 for SGI and Apple, correct, four of the five?

10:21 25 A. Well, if you accept the calculation of software

10:21 1 sales. And so with that qualification, sure.

10:21 2 Q. The difference is in what was paid for them,
10:21 3 correct?

10:21 4 A. Yes.

10:21 5 Q. And would you agree with me that \$96,000 -- or,
10:21 6 I'm sorry, 1.2 million -- it's not really 1.2 million,
10:21 7 it's actually 1.25 million, right?

10:22 8 A. I think we adjusted for present value in that
10:22 9 calculation. It is 1.25 million, yes, that's right.

10:22 10 Q. Would you agree with me that 1.25 million is
10:22 11 roughly 13 times \$96,000?

10:22 12 A. I think your math is right.

10:22 13 Q. So even though you've testified that software
10:22 14 prices went down over time, correct?

10:22 15 A. Yes.

10:22 16 Q. At least in this instance, Apple was valuing
10:22 17 the technology much greater than SGI?

10:22 18 A. Well, you know, it's-- I don't know how much
10:22 19 you want to get into this. Remember all of Apple's
10:22 20 products were licensed, so not just their computers, but
10:22 21 also their iPhones and iPods and any -- anything that
10:22 22 uses their operating system.

10:22 23 And so if you were trying to do a, quote,
10:22 24 unquote, apples-to-apples comparison, you'd have to
10:23 25 adjust for that in the Silicon Graphics license, and I

10:23 1 can't think of any good way to do that.

10:23 2 Q. You're not telling this jury that these patents
10:23 3 apply to all of Apple's products, correct?

10:23 4 A. I -- my understanding is that's -- that
10:23 5 language is taken directly from the Apple license
10:23 6 agreement.

10:23 7 Q. But do you have any understanding that the iPod
10:23 8 or iPad would have infringed these patents?

10:23 9 A. My understanding as an economist, we'll take it
10:23 10 for what it's worth, is that the iPad and the iPhone and
10:23 11 the iPod all run scaled-down versions of a Macintosh
10:23 12 operating system, and so they very well could have
10:23 13 multiple workspaces if you wanted them to.

10:23 14 Q. Okay. You understand that -- that my clients
10:23 15 sued Apple over the Tiger Operating System, correct?

10:23 16 A. Well, I think that they gave the Tiger
10:24 17 Operating System as an example of infringement, yes.

10:24 18 Q. That's -- that's the operating system that they
10:24 19 identified in the complaint that was filed, correct?

10:24 20 A. I think that's right, yes.

10:24 21 Q. All right. And then the Tiger Operating System
10:24 22 was supplanted and replaced by the Leopard Operating
10:24 23 System, correct?

10:24 24 A. That's also my understanding, yes.

10:24 25 Q. Now, here you've assumed a billion in sales for

10:24 1 SGI?

10:24 2 A. As I recall, the only information we had was
10:24 3 there was 23 billion dollars in sales of systems, and so
10:24 4 for the purposes of trying to get a number, we said,
10:24 5 well, let's assume that 5 percent of those sales are
10:24 6 attributable to the operating system, but that was an
10:24 7 assumption, not based on anything, so --

10:24 8 Q. In fact, you mention in your report that you
10:24 9 couldn't find any sales information for the SGI product,
10:25 10 correct?

10:25 11 A. Other than the aggregate level of sales, which
10:25 12 was 23 billion, that's right.

10:25 13 Q. Which -- which didn't specifically address the
10:25 14 product being licensed, correct?

10:25 15 A. It incorporated the product being licensed,
10:25 16 which is the operating system, but other than that, yes.

10:25 17 Q. Just so we're clear, you didn't have any
10:25 18 information to measure the sales of the product that was
10:25 19 being licensed, correct?

10:25 20 A. That's true.

10:25 21 Q. And that's one of the things -- the expected
10:25 22 demand that somebody would look at in a lump -- in
10:25 23 negotiating a lump sum payment, correct?

10:25 24 A. As a matter of principle, sure.

10:25 25 Q. But you didn't have that and -- and neither do

10:25 1 we, correct?

10:25 2 A. Yes.

10:25 3 Q. But we did have indications in the record that
10:25 4 SGI was prepared to dismantle, disable, or otherwise not
10:25 5 use the feature?

10:25 6 A. They indicated that they were prepared to do
10:25 7 that, that's true.

10:25 8 Q. And one of the things that you've -- that
10:25 9 you've cited in the past is the Sherry and Teece study?

10:26 10 A. You mean in other expert reports or other
10:26 11 cases?

10:26 12 Q. Or didn't you mention in this case, 45 to 5
10:26 13 percent range?

10:26 14 A. Yeah, I think we established that I didn't cite
10:26 15 it in this case.

10:26 16 Q. Okay.

10:26 17 A. I'm aware of it.

10:26 18 Q. And one of the things that they identified was
10:26 19 in some instances, the value of an invention just
10:26 20 because of other circumstances actually can increase
10:26 21 over time, correct?

10:26 22 A. That can happen.

10:26 23 Q. And you're not ruling that out in this case,
10:26 24 are you?

10:26 25 A. I actually am ruling it out in this case.

10:26 1 Q. Just one more thing on HP. I think you said on
10:26 2 direct examination that the day they got the product,
10:26 3 they wanted to decrease the price?

10:26 4 A. Yes.

10:26 5 Q. Is there any evidence that -- that Xerox was
10:26 6 aware of any intention to decrease the price of the \$99
10:27 7 unit?

10:27 8 A. Xerox knew that HP was selling the business to
10:27 9 Borland. So they knew Borland was a -- going to be the
10:27 10 person actually operating under the license, and I don't
10:27 11 know -- I don't know what Xerox knew about Borland's
10:27 12 marketing plans at the time of that negotiation.

10:27 13 Q. All right. I want to go to HP real quick.
10:27 14 Here you said the rate is not applicable, correct?

10:27 15 A. Because there is no -- there is no rate, that's
10:27 16 right, yes.

10:27 17 Q. And you've ridiculed Mr. Gemini in the past
10:27 18 about using a 99 percent -- 99 cent per unit rate,
10:27 19 correct?

10:27 20 A. I object to the characterization. I wouldn't
10:27 21 say I ridiculed him. I said it was factually incorrect.

10:27 22 Q. Wait. I think you told me in your deposition
10:28 23 you ridiculed him.

10:28 24 MR. VICKREY: Kindly turn to 997, I think
10:28 25 schedule 10. Let's focus on Hewlett Packard, please.

10:28 1 Q. (By Mr. Vickrey) This is your report, please?

10:28 2 A. Yes.

10:28 3 Q. And kindly --

10:28 4 MR. VICKREY: Put the whole thing up.

10:28 5 Q. (By Mr. Vickrey) We -- we have different
10:28 6 columns. One is what you've called the observed
10:28 7 royalty?

10:28 8 A. Yes.

10:28 9 Q. And tell us what you've used as your observed
10:28 10 royalty for the HP license?

10:28 11 A. Well, we -- we calculated using Mr. Gemini's
10:28 12 method one percent of \$99, and if you do the math, then
10:28 13 that's 99 cents.

10:28 14 Q. Well, that's not what you said in your report.
10:28 15 You didn't say this is Mr. Gemini's analysis. This is
10:28 16 your analysis, correct?

10:28 17 A. Well, but this is an analysis based on the
10:28 18 percentage of revenue which at the time was
10:28 19 Mr. Gemini's theory. It no longer is. So I was trying
10:28 20 to conform my criticism of Mr. Gemini to what he
10:29 21 actually said.

10:29 22 Q. All right. I want to wrap this up. I think I
10:29 23 heard you testify yesterday, and I'm sorry to do this,
10:29 24 but I think you said the Apple license reached back six
10:29 25 years, something like that?

10:29 1 A. That's my understanding of the way it was --
10:29 2 the Plaintiffs -- these Plaintiffs pled that case.

10:29 3 Q. All right. But you're not a lawyer, correct?

10:29 4 A. That's certainly true.

10:29 5 Q. But, nonetheless, you try to keep up with the
10:29 6 case law in patent infringement -- in the patent
10:29 7 infringement arena, correct?

10:29 8 A. As much as an economist can. I rely on lawyers
10:29 9 for legal advice.

10:29 10 Q. All right. You're aware my clients sued Apple
10:29 11 on the '412 patent on a method claim?

10:29 12 A. Yes.

10:29 13 Q. And are you aware of any court opinions or
10:30 14 statutes that would have allowed IPI to obtain past
10:30 15 damages on a method claim on Apple sales prior to
10:30 16 receiving notice of the patent?

10:30 17 A. My understanding is that when you plead a
10:30 18 method claim, you can go back six years for damages.
10:30 19 That's my understanding.

10:30 20 Q. Well, I'm talking about two different things.
10:30 21 I'm -- I'm distinguishing Apple's internal use from
10:30 22 Apple's sales to third parties. Let's take the latter
10:30 23 situation.

10:30 24 Are you -- can you tell us any court
10:30 25 opinion or statute that would have allowed my clients to

10:30 1 reach back six years for damages against Apple on sales
10:30 2 on a method claim?

10:30 3 A. Well, Mr. Vickrey, for the purposes of
10:30 4 this -- this case, I think I would say that's the advice
10:30 5 I've been given, and that's the interpretation of the
10:30 6 law. So I'm not going to cite case law to you because I
10:31 7 think it would be improper.

10:31 8 Q. Well -- I'll move on.

10:31 9 You heard evidence as to the how --
10:31 10 talking about Apple again. You heard evidence as to how
10:31 11 the system that IPI sued on, the Tiger system required
10:31 12 separate users to log in and log off before they could
10:31 13 switch, correct?

10:31 14 A. I did hear that discussion, yes, uh-huh.

10:31 15 Q. And have you -- and have you heard any evidence
10:31 16 or any testimony from the Defendants' experts that the
10:31 17 Tiger method would infringe any of the patents-in-suit?

10:31 18 A. My understanding from the complaint was that it
10:31 19 did -- they did specifically accuse instances in which
10:31 20 there were multiple users, but, obviously, this is
10:32 21 beyond both my legal expertise and my technical
10:32 22 expertise. But my -- my understanding was that they
10:32 23 contemplated the multiple user log-in scenario.

10:32 24 Q. Okay. My question was something a little
10:32 25 different.

10:32 1 Did you hear any testimony from the
10:32 2 Defendants' experts that the Tiger method would infringe
10:32 3 any of the patents-in-suit?

10:32 4 A. Well, the Defendants' experts are -- were hired
10:32 5 to analyze the Red Hat and Novell systems, and so I
10:32 6 don't -- I don't recall any testimony about the Apple
10:32 7 operating system.

10:32 8 Q. But, now, if the patents just covered Leopard,
10:32 9 assume with me just that fact, we're talking roughly 4
10:32 10 million units sold in the U.S., correct?

10:32 11 A. If you're talking -- I don't have the numbers
10:32 12 off the top of my head.

10:32 13 MR. VICKREY: Kindly flash up PX316. Next
10:33 14 page. Yeah, highlight the Mac sales, U.S.

10:33 15 Q. (By Mr. Vickrey) This is Apple's annual
10:33 16 report, and this shows, does it not, for 2008 that the
10:33 17 total sales were less than 4 million units?

10:33 18 A. For -- for the Americas, that's true, but it's
10:33 19 a worldwide license.

10:33 20 Q. Right. But these -- these were the same
10:33 21 patents, the same U.S. patents, correct, that we're
10:33 22 talking about, the Apple license?

10:33 23 A. The Apple license is a worldwide license under
10:33 24 the U.S. patents, that's true.

10:33 25 Q. For the same patents-in-suit in this case, same

10:33 1 U.S. patents?

10:33 2 A. The Apple license covers the same
10:33 3 patents-in-suit in this case, yes, that's right.

10:33 4 Q. All right. You also heard testimony that Apple
10:33 5 threatened to delay the release of the Leopard system
10:34 6 until after the patents expired, correct?

10:34 7 A. I think that actually mischaracterizes the
10:34 8 testimony. I think that was at most what Mr. Cooper
10:34 9 said that an Apple lawyer told him that Apple might have
10:34 10 been thinking. But --

10:34 11 Q. But you heard Mr. Riveros testify that -- that
10:34 12 it would have been difficult for Red Hat to remove this
10:34 13 feature from its products?

10:34 14 A. I actually wasn't here, as I said, for Mr.
10:34 15 Riveros' testimony.

10:34 16 MR. VICKREY: That's all I have, sir.
10:34 17 Thank you.

10:34 18 THE COURT : Thank you, Mr. Vickrey.
10:34 19 Mr. Reiter?

10:34 20 MR. REITER: I will try and be very brief,
10:34 21 Your Honor.

10:34 22 THE COURT: Thank you.

10:34 23 REDIRECT EXAMINATION

10:34 24 BY MR. REITER:

10:34 25 Q. Just very quickly, Dr. Putnam. I wanted to

10:34 1 review the SGI license and the Apple license.

10:35 2 MR. REITER: If, Mr. Barns, you could put
10:35 3 up DX773, please, and go to Article 1.1 on the second
10:35 4 page. 1.1, please. Oh, I need to switch.

10:35 5 COURT ROOM DEPUTY: You need to switch.

10:35 6 MR. REITER: Okay. Thank you.

10:35 7 Q. (By Mr. Reiter) What is the licensed product
10:35 8 here under the SGI license?

10:35 9 A. The licensed product is the desks and desk
10:35 10 overview application which is their -- I understand is
10:35 11 their -- component of that graphical user interface
10:35 12 within the IRIX operating system, which is what SGI
10:35 13 called its operating system.

10:35 14 Q. Does that license that SGI provi -- or received
10:35 15 cover all of their products?

10:35 16 A. Yes.

10:35 17 Q. All products at SGI are covered by this
10:35 18 license?

10:35 19 A. Well, in other words, anything that -- anything
10:36 20 that incorporates the desks and desk overview
10:36 21 application within the operating system, yes.

10:36 22 Q. Okay.

10:36 23 MR. REITER: If we can turn to DX740,
10:36 24 please, and also put up Section 1.1, licensed product.

10:36 25 Q. (By Mr. Reiter) This is from the Apple

10:36 1 agreement. And what does this cover in contrast to the
10:36 2 SGI license?

10:36 3 A. Well, this is obviously broader. It means any
10:36 4 product, service, devices, system, hardware, software,
10:36 5 or offering made, used, sold, offered for sale, leased,
10:36 6 purchased, licensed or imported by or for Apple or an
10:36 7 Apple affiliate.

10:36 8 Q. So how do the SGI and Apple license grants
10:36 9 compare?

10:36 10 A. Well, this -- this covers the entire operating
10:36 11 system and hardware and software. The SGI license
10:36 12 covered the, it says, the desks and desk overview
10:36 13 application within the operating system, and so this is
10:36 14 going to -- the grant -- I think what's being granted
10:36 15 here is much broader.

10:37 16 Q. Now, I want to turn briefly to the HP license.
10:37 17 Recall Mr. Vickrey asked you some questions about the
10:37 18 \$110,000 applied to 125,000 units?

10:37 19 A. Yes.

10:37 20 Q. And tried to come up with some kind of a rate
10:37 21 for that?

10:37 22 A. Yes.

10:37 23 Q. Is there something missing in that calculation?

10:37 24 A. Yes.

10:37 25 Q. What's missing?

10:37 1 A. Well, as you recall from the HP license,
10:37 2 there's -- remember, what's happening at the HP license
10:37 3 is that there's sales going backwards and there's sales
10:37 4 going forwards, because we're -- HP is transferring the
10:37 5 business to Dashboard. So this is you're cleaning out
10:37 6 your house and you're trying to get your house in order,
10:37 7 and so you're paying for the sales that you made in the
10:37 8 past, and you're paying for the sales that Borland is
10:37 9 going to make going forward.

10:37 10 Mr. Vickrey applied the \$110,000 payment
10:37 11 only to the sales going past but didn't apply it to the
10:37 12 sales going forward. If you were going to compute the
10:37 13 rate effectively, you would say this \$110,000 payment
10:37 14 needs to apply both to HP sales that it's already made
10:37 15 and to all the sales, at least up to 10 million, that
10:38 16 Borland is going to make in the future.

10:38 17 So you can't just take \$110,000 and divide
10:38 18 it by the 125,000 units because you're forgetting about
10:38 19 the future. That's not what the license says.

10:38 20 Q. Another subject, we've all heard about it a
10:38 21 lot, and I'm not -- I'm just going to have one or two
10:38 22 questions.

10:38 23 IP addresses. In the hypothetical
10:38 24 negotiations, would the parties here in your opinion
10:38 25 have used that as a way of counting rev -- or counting

10:38 1 the base?

10:38 2 A. No.

10:38 3 Q. Why not?

10:38 4 A. Well, so first of all, we can't find any
10:38 5 licenses where they actually do do that. And so I'm an
10:38 6 economist. I look at what people do. And the common
10:38 7 sense thing is to see if people actually use IP
10:38 8 addresses to negotiate licenses. Nobody does that.

10:38 9 If you can't find a license where people
10:38 10 actually do this, it doesn't make any sense to propose a
10:38 11 license and say the parties would have agreed to it
10:38 12 based on IP addresses.

10:38 13 And then for all the reasons I'm sure
10:38 14 we're now -- will be relieved not to hear from anymore,
10:38 15 IP addresses don't correspond to users. And so, you
10:39 16 know, Albert Einstein said that not everything that
10:39 17 counts can be counted and not everything that can be
10:39 18 counted counts. Okay. Just because you can find a
10:39 19 number doesn't mean it means anything. IP addresses
10:39 20 have nothing to do with how many people actually use the
10:39 21 Plaintiffs' product.

22 Q. Next subject. Mr. Vickrey showed you something
10:39 23 he called anecdotal evidence. We've been using that.
10:39 24 What does that mean, anecdotal evidence?

10:39 25 A. That's a -- that's a \$5 word for a five cent

10:39 1 concept. It just means that it's stories. If I tell
10:39 2 you an anecdote, it means that I went over to the Ford
10:39 3 dealer yesterday and tried to buy a part for my car.

10:39 4 That's a story. It doesn't tell you
10:39 5 anything about how many parts Ford sells or how many
10:39 6 Ford dealers there are in the country. It doesn't tell
10:39 7 you any systematic information. It's just a story about
10:39 8 me.

10:39 9 And Mr. Gemini told stories about how
10:39 10 people had used this feature and how it was important to
10:39 11 them.

10:39 12 Q. Well, I just want to clarify -- strike that.

10:39 13 Have you seen anything from Red Hat or
10:39 14 Novell that talks about people using this feature or
10:40 15 this product or demand for this product?

10:40 16 A. No.

10:40 17 Q. This feature? So the only thing we've seen is
10:40 18 this anecdotal evidence; is that right?

10:40 19 A. Yes, there was something from Ubuntu, which is
10:40 20 a competitor, actually, and a couple blogs or -- or
10:40 21 reviews.

10:40 22 Q. Now the next subject, the Janake article, you
10:40 23 talked about that a little bit this morning with me and
10:40 24 also with Mr. Vickrey, recall that?

10:40 25 A. Yes.

10:40 1 Q. You said you didn't use it, and you had an
10:40 2 explanation, and I just want to make sure that we all
10:40 3 understand. Why do you think that it is not the best
10:40 4 article to use?

10:40 5 A. Professor Janake picked a certain sample of
10:40 6 cases to analyze. He picked the cases that go up to
10:40 7 Washington to -- on appeal where Judge Rader's court
10:40 8 actually is. And those cases are not a random sample of
10:40 9 the entire population. They're a particular set of
10:41 10 cases.

10:41 11 It's sort of like the car example. The
10:41 12 cars that you see in the shop at the dealer are not a
10:41 13 random sample of all the cars on the road; they're the
10:41 14 ones that need fixing. And so it's in the same -- it's
10:41 15 sort of the same thing, when cases go up on appeal to
10:41 16 Judge Rader's court, they're the ones that need fixing.

10:41 17 And so you can't draw an inference from
10:41 18 that sub-sample of cases about all the cases as a whole.
10:41 19 And so you wouldn't use that as the basis for trying to
10:41 20 figure out how much the license should be discounted in
10:41 21 a negotiation, because in the real world, parties
10:41 22 wouldn't use -- wouldn't do what Mr. Janake did to try
10:41 23 to figure out the odds of winning at trial. It's not
10:41 24 the right way to think about it.

10:41 25 Q. Let me be clear, though, but in your analysis,

10:41 1 you did account for this risk, did you not?

10:41 2 A. I just used a different number because
10:41 3 Mr. Janake's number -- he tried to do the right thing,
10:41 4 he just didn't get it right.

10:41 5 Q. Okay. But you -- you acted for it?

10:41 6 A. I did, yes.

10:41 7 Q. Okay. Last thing.

10:41 8 MR. REITER: I want to put up DX936,
10:42 9 Exhibit 16 please. I don't think everybody was able to
10:42 10 see that.

10:42 11 Q. (By Mr. Reiter) And this is a chart from your
10:42 12 expert report; is that right?

10:42 13 A. Yes.

10:42 14 Q. So what -- what was this?

10:42 15 A. Well, now, I've seen this three or four times.
10:42 16 This is just -- so in -- the way this works is I have to
10:42 17 tell everybody what my opinions are going to be before I
10:42 18 come to court. And so I have to give a report.

10:42 19 And one of my opinions is the nine-part
10:42 20 test for why it is you wouldn't pick a running royalty.
10:42 21 And so I put this exhibit into my report, and I copied
10:42 22 it to show to the jury, and it's basic -- it's
10:42 23 essentially identical. I can't see any differences.

10:42 24 Q. Now, in creating this -- this chart and the
10:42 25 factors in the chart, did you use things such as the

10:42 1 Georgia-Pacific factors and your training as an
10:42 2 economist to determine what was appropriate?

10:42 3 A. Of course.

10:42 4 Q. You didn't just pick them out of the air, did
10:43 5 you?

10:43 6 A. Well, no. So, for example, we talked about the
10:43 7 incidence of use, and so that's Factor 11 under
10:43 8 Georgia-Pacific.

10:43 9 And the question is, did each unit
10:43 10 generate revenue? And that's one of the factors under
10:43 11 Georgia-Pacific. How do you -- does the sale of the
10:43 12 product allow you to make money by selling other
10:43 13 products.

10:43 14 And, you know, what I call the input
10:43 15 market and the output market, just what do competitors
10:43 16 pay for this in this market? So it's all completely
10:43 17 within Georgia-Pacific.

10:43 18 MR. REITER: I have no further questions.

10:43 19 THE COURT: Thank you, Mr. Reiter.

10:43 20 Mr. Vickrey?

10:43 21 MR. VICKREY: Nothing further, Your Honor.

10:43 22 THE COURT: Thank you.

10:43 23 Thank you, Dr. Putnam, you may step down.

10:43 24 THE WITNESS: Thank you, Your Honor.

10:43 25 THE COURT: Mr. Reiter?

10:43 1 MR. REITER: At this point, Your Honor, we
10:43 2 -- the Defendants rest.

10:43 3 MR. HILL: Your Honor, at this time, the
10:43 4 Plaintiffs close.

10:43 5 THE COURT: Then thank you, gentlemen.
10:43 6 We've come to the close of the presentation of evidence,
10:44 7 ladies and gentlemen. We will now proceed to the next
10:44 8 and important part of this case, the instructions.

10:44 9 Mr. Gasey, do you have some comments
10:44 10 before that?

10:44 11 MR. GASEY: Your Honor, just to save time
10:44 12 for the jury, I'm assuming that we have the same
10:44 13 arrangement to preserve our Rule 50 motion, so we --

10:44 14 THE COURT: Absolutely. Excuse me.

10:44 15 MR. HILL: Would you like to do that here,
10:44 16 Your Honor, or at the sidebar?

10:44 17 THE COURT: Yeah, come up to the sidebar.
10:44 18 We can do that very quickly here.

10:44 19 (Bench conference.)

10:44 20 MR. GASEY: Sorry, Your Honor.

10:44 21 THE COURT: No, no, no, I was the one that
10:44 22 was trying to rush along.

10:44 23 Mr. Gasey?

10:44 24 MR. GASEY: Yes, Your Honor, we'd like to,
10:44 25 if it's agreeable with the Defendants, make our JMOL

10:44 1 record on paper but have the Defendants agree that we
10:44 2 would have our rights preserved as if they were timely
10:44 3 made in Court at this time.

10:44 4 MR. REITER: Okay. And we will be
10:45 5 renewing our JMOL, as well, not that we've been fully
10:45 6 heard, and --

10:45 7 THE COURT: That will be fine.

10:45 8 MR. REITER: Okay.

10:45 9 THE COURT: And we will acknowledge all of
10:45 10 this as happening in open court.

10:45 11 MR. REITER: Okay. Then everything is
10:45 12 preserved.

10:45 13 THE COURT: And then you can do it all in
10:45 14 paper to preserve every last word.

15 MR. REITER: Okay. Thank you, Your Honor.

16 MR. GASEY: Thank you.

17 THE COURT: Now I'll go right into an
18 instruction.

19 MR. GASEY: Okay.

10:45 20 (Bench conference concluded.)

10:45 21 THE COURT: Mr. Gasey, Mr. Reiter, as the
10:45 22 Court goes through its instructions. I was thinking I
10:45 23 might put them on the screen. Is that --

10:45 24 MR. GASEY: That's fine, Your Honor.

10:45 25 MR. REITER: Yeah.

10:45 1 THE COURT: Does that work for you?

10:45 2 MR. REITER: Yes, Your Honor.

10:45 3 THE COURT: It sometimes helps to -- this
10:46 4 is a little dangerous. You're going to see where I'm
10:46 5 ad-libbing because you'll see what is written down as
10:46 6 instructions.

10:46 7 Ladies and gentlemen, just to make sure
10:46 8 you understand what we're going to do, I will now give
10:46 9 you your instructions on the law. They will reference
10:46 10 the verdict form which you will have when you go into
10:46 11 the deliberation room, and they will reference also the
10:46 12 claim construction defining the terms of the claim.

10:46 13 Following that, each of the parties has
10:47 14 about an hour to argue to you the -- their view of how
10:47 15 the case should be decided. Let's go through my jury
10:47 16 instructions, and then let's talk about the timing. The
10:47 17 parties have jointly agreed to provide you with a lunch,
10:47 18 and that's being brought in in a timely fashion. What
10:47 19 we'll decide together is when to have that lunch, and --
10:47 20 but let's first dispose of the -- this important part of
10:47 21 the law.

10:47 22 The reason we're slowing down just a
10:48 23 little is I realized the copy you have up there is not
10:48 24 the final copy. You're hurting my feelings. I think I
10:48 25 have a very profound voice. She's making me use the

10:48 1 microphone.

10:49 2 Members of the jury, I will now provide
10:49 3 you with the final instructions on the law. As you're
10:49 4 aware from the presentation of evidence, we must address
10:50 5 several -- several areas of the law. I will identify
10:50 6 each issue, the parties' contentions as to that issue
10:50 7 and the particular questions you will answer during your
10:50 8 deliberations and the law you must follow. You will
10:50 9 have a copy of these final instructions for your
10:50 10 reference here to follow along. I ask you to read
10:50 11 along.

10:50 12 Please listen carefully to everything I'm
10:50 13 telling you now. You'll be provided with copies of a
10:50 14 verdict form. You must answer each and every one of the
10:50 15 questions on the verdict form unless it instructs you to
10:50 16 skip a question. Your foreperson must sign and date the
10:50 17 form.

10:50 18 Now let's talk about your duties first.
10:50 19 You have two main duties as a juror. First, you must
10:50 20 decide what the facts are from the evidence you saw and
10:51 21 heard here in Court. Second, you must take the law that
10:51 22 I give you, apply it to the facts, and answer the
10:51 23 questions in the verdict form.

10:51 24 It's my job to instruct you about the law.
10:51 25 You are bound by the oath that you took at the beginning

10:51 1 of the trial to follow those instructions. My
10:51 2 instructions include an instruction on the meaning of
10:51 3 the patent claims. You'll take that with you into the
10:51 4 room.

10:51 5 Let me start by defining evidence. We
10:51 6 talked about this a bit, but you must make your decision
10:51 7 based only on evidence you saw and heard here in court.
10:51 8 The evidence in this case includes only what the
10:51 9 witnesses said while they were testifying under oath,
10:51 10 the exhibits admitted into evidence, and the
10:51 11 stipulations that the lawyers may have agreed to, and
10:51 12 the facts I will instruct you to take as true.

10:51 13 Nothing else is evidence. The lawyers'
10:51 14 arguments, questions, objections, and statements are not
10:51 15 evidence. My legal rulings aren't evidence. Any of my
10:52 16 comments and questions are not evidence.

10:52 17 Certain physical exhibits have been
10:52 18 admitted into evidence. You may rely upon such exhibits
10:52 19 that have been admitted into evidence, even if the
10:52 20 underlying materials are not here. However, the
10:52 21 authenticity of those exhibits has in some cases been
10:52 22 challenged. It's for you to decide how much if any
10:52 23 weight you give to them. In making that decision you
10:52 24 should consider all the testimony you heard about the
10:52 25 way the exhibits were prepared and other indicia of

10:52 1 reliability.

10:52 2 There are two types of evidence you must
10:52 3 consider. One is direct evidence, such as testimony of
10:52 4 an eyewitness. The other is circumstantial evidence,
10:52 5 the proof of circumstances that tend to prove or
10:52 6 disprove the existence or nonexistence of certain other
10:52 7 facts. The law makes no distinction between direct and
10:52 8 circumstantial evidence.

10:52 9 You should use your common sense in
10:52 10 weighing the evidence. Consider it in light of your
10:53 11 everyday experience and give it whatever weight you
10:53 12 think it deserves.

10:53 13 Witnesses. In determining the weight you
10:53 14 give to the testimony of a witness, you should ask
10:53 15 yourself whether the evidence tended to show that the
10:53 16 witness testified falsely about some fact or whether the
10:53 17 evidence showed that at some other time the witness said
10:53 18 or did something or failed to say or do something that
10:53 19 was different from the testimony at trial.

10:53 20 When specialized knowledge or experience
10:53 21 about a particular matter may be helpful a person who
10:53 22 has special training or experience in that technical
10:53 23 field -- we'll call those the expert witnesses -- may
10:53 24 state his or her opinions on those matters. You need
10:53 25 not accept the opinion of any of these expert witnesses.

10:53 1 As with any other witness, you're free to decide what
10:53 2 you rely on.

10:53 3 Summary of contentions. To help you
10:53 4 follow the evidence, I'm going to summarize the
10:53 5 positions of the parties. The Plaintiffs in this case
10:54 6 are IP Innovation, LLC, and Technology Licensing
10:54 7 Corporation. Those are the Plaintiffs. Mr. Gasey,
10:54 8 Mr. Hill, and you're familiar with that.

10:54 9 The Defendants are Red Hat and Novell.
10:54 10 Collectively called the Defendants, and that's Mr.
10:54 11 Krevitt, Mr. Reiter, Ms. LaValle, and the others.

10:54 12 This case involves three U.S. patents,
10:54 13 U.S. Patent '412, '521, and '183, each entitled user
10:54 14 interface with multiple workspaces for sharing display
10:54 15 system objects, and was originally assigned to Xerox
10:54 16 Corporation. The patents were later transferred from
10:54 17 Xerox to the Plaintiffs. For convenience, the parties
10:54 18 and I will often refer to these three patents as the
10:54 19 patents-in-suit or by using their last three numbers.

10:54 20 Plaintiffs filed suit in this Court
10:54 21 seeking money damages from Defendants for allegedly
10:55 22 infringing the patents-in-suit by using, selling, and
10:55 23 offering for sale in the United States products and
10:55 24 processes that the Plaintiffs argue are covered by
10:55 25 Claims 1 and 21 of the '412 patent, Claim 8 of the '521

10:55 1 patent, and Claim 1 of the '184. You're dealing with
10:55 2 four claims. Remember that. Plaintiffs also argue that
10:55 3 Defendants actively induced their customers to infringe
10:55 4 the patents-in-suit.

10:55 5 Defendants deny that they have infringed
10:55 6 or actively induced infringement of the asserted claims.
10:55 7 Defendants also argue that the claims are invalid.

10:55 8 Your job will be to decide whether or not
10:55 9 Defendants have infringed any asserted claims of the
10:55 10 patents-in-suit and whether or not those claims are
10:55 11 invalid. If you decide they have infringed any valid
10:56 12 asserted claim of the patents-in-suit, you will then
10:56 13 need to decide any money damages to be awarded to
10:56 14 Plaintiffs.

10:56 15 Let's talk about the claim interpretation.
10:56 16 Because only the claims of a patent can be infringed you
10:56 17 must understand the scope and meaning of the claims
10:56 18 before undertaking any infringement analysis.

10:56 19 It's my duty to interpret those claims for
10:56 20 you. It is your duty to apply my interpretation of the
10:56 21 meanings of the claims to the accused products and the
10:56 22 use of the accused products.

10:56 23 I'm going to send with you into the
10:56 24 deliberation room a handout that explains the meanings
10:56 25 of some of the words of the claims in this case. As

10:56 1 I've previously instructed you, you must accept my
10:56 2 definition of those words as correct. Any words in the
10:56 3 claim which I have not provided a definition for, you
10:56 4 should apply their plain English meaning to those.

10:56 5 You should not take my definition of the
10:57 6 language of the claims as an indication that I have a
10:57 7 view regarding how you should decide those issues that
10:57 8 you are being asked to decide, such as infringement and
10:57 9 validity. Those issues are yours to decide.

10:57 10 Talk about burdens of proof. Plaintiffs
10:57 11 have the burden of proving infringement and damages by
10:57 12 what is called a preponderance of the evidence. That
10:57 13 means the Plaintiffs have to produce evidence, which
10:57 14 when considered in light of all the facts, leads you to
10:57 15 believe that Plaintiffs' claim is more likely true than
10:57 16 not.

10:57 17 To put it differently, if you were to put
10:57 18 Plaintiffs' and Defendants' evidence on opposite sides
10:57 19 of a scale, the evidence supporting Plaintiffs' claims
10:57 20 would have to make the scale tip on their side.

10:57 21 If you believe that Plaintiffs have met
10:57 22 their burden of proving patent infringement and damages
10:57 23 by a preponderance of evidence, you must find in favor
10:57 24 of Plaintiffs. If you believe that Plaintiffs have not
10:58 25 met their burden of proof for the patents-in-suit, you

10:58 1 must find in favor of Defendants.

10:58 2 A patent and its claims are presumed to be
10:58 3 valid. In this case, Defendants claim that the asserted
10:58 4 claims are invalid. Accordingly, Defendants have the
10:58 5 burden of proving that each of the claims is invalid by
10:58 6 a clear and convincing evidence standard.

10:58 7 Clear and convincing evidence is evidence
10:58 8 that produces in your mind an abiding conviction that
10:58 9 the claims are invalid. Therefore, for Defendants to
10:58 10 prevail on the invalidity issue, you must be persuaded
10:58 11 that it is highly probable that what Defendants seek to
10:58 12 prove is true.

10:58 13 If you believe that Defendants have met
10:58 14 their burden of proving invalidity by clear and
10:58 15 convincing evidence, you must find in favor of
10:58 16 Defendants. If you believe they have not met their
10:58 17 burden, you must find in favor of Plaintiffs on the
10:59 18 issue of validity.

10:59 19 Those of you who are familiar with
10:59 20 criminal cases will have heard the term beyond a
10:59 21 reasonable doubt. That burden does not apply in any
10:59 22 civil case, and, therefore, you should put it out of
10:59 23 your mind in considering whether Defendants or
10:59 24 Plaintiffs have met their burden of proof in this case.

10:59 25 Let's talk about the issues you're going

10:59 1 to decide now. Those are infringement, validity, and
10:59 2 damages.

10:59 3 When you get your verdict form, you'll see
10:59 4 23 questions. It's really just those three questions
10:59 5 for each of the Plaintiffs, for each of the Defendants,
10:59 6 and for each of the claims. I'll explain that as we go
10:59 7 along.

10:59 8 Infringement, that's assessed on a
10:59 9 claim-by-claim basis. Therefore, there may be
11:00 10 infringement as to one claim but not infringement on
11:00 11 another. In this case, there are two possible ways to
11:00 12 find that a claim may be infringed, direct infringement
11:00 13 and active inducement.

11:00 14 Let's talk about the first one, direct
11:00 15 infringement.

11:00 16 Plaintiffs contend that Defendants
11:00 17 directly infringed Claims 1 and 21 of the '412 patent
11:00 18 through the manufacture, use, sale, or offer for sale
11:00 19 within the U.S. or its territories of server and
11:00 20 desktop-based operating systems.

11:00 21 Plaintiffs contend that Defendants
11:00 22 directly infringe Claim 8 of the '521 patent through the
11:00 23 manufacture, use, sale, or offer to sale within the
11:00 24 United States of server and desktop-based operating
11:00 25 system.

11:00 1 They contend that Defendants directly
11:00 2 infringe Claim 1 of the '183 patent through the
11:01 3 manufacture, use, sale, or offer for sale within the
11:01 4 United States of server and desktop-based operating
11:01 5 systems.

11:01 6 Defendants deny that they have infringed
11:01 7 any of the asserted claims of the patents-in-suit
11:01 8 through the manufacture, use, sales, or offer for sale
11:01 9 within the United States or its territories of their
11:01 10 server and desktop-based operating systems.

11:01 11 The law. Only the claims of a patent can
11:01 12 be infringed. Neither the specification, which is the
11:01 13 written description of the invention, nor the drawings
11:01 14 of a patent can be infringed. Infringe -- infringement
11:01 15 is assessed on a claim-by-claim basis. Therefore, as I
11:01 16 said before, you can have infringement of one claim but
11:01 17 not another.

11:01 18 To prove infringement of each of the
11:01 19 patents-in-suit, Plaintiffs have the burden of proving
11:01 20 by a preponderance of the evidence that during the
11:01 21 lifetime of the patents-in-suit, the Defendants made,
11:02 22 used, sold, or offered to sell within the United States
11:02 23 a product or process that meets all of the requirements
11:02 24 of a claim of each of the patents-in-suit.

11:02 25 In your analysis of whether the Plaintiffs

11:02 1 meet their burden of proof, you must compare the accused
11:02 2 products or one's use of the accused products with each
11:02 3 and every one of the requirements of a claim to
11:02 4 determine whether all of the requirements of that claim
11:02 5 are met. If they have not met their burden of proof,
11:02 6 you must find for Defendants.

11:02 7 Claims 1 and 21 of the '412 patent use the
11:02 8 phrases display object means for generating, control
11:02 9 means for accessing and input means for receiving.
11:02 10 These means for phrases are special phrases in patent
11:02 11 law. They're called means-plus-function requirements.

11:02 12 Each of these claims cover the structure
11:03 13 described in the patent that performs that function.
11:03 14 The claims also cover equivalents to the structure found
11:03 15 in the patent for that function.

11:03 16 You should apply my definitions of the
11:03 17 functions and the structures for these
11:03 18 means-plus-function clauses as you would my definition
11:03 19 of any other claim term.

11:03 20 A product meets the means-plus-function
11:03 21 requirements of the claims if two conditions are met:
11:03 22 It has a structure or set of structures that perform the
11:03 23 identical function in the claim, and -- and that
11:03 24 structure or set of structures is either identical to
11:03 25 or equivalent to the structure that I defined earlier as

11:03 1 performing the function.

11:03 2 A structure is a set of -- or a set of
11:03 3 structures is equivalent to the structure I have defined
11:03 4 if a person having ordinary level of skill in the field
11:04 5 of technology of the patents-in-suit would have
11:04 6 considered the differences between them to be
11:04 7 insubstantial at the time the alleged infringement
11:04 8 occurred.

11:04 9 If you find that the Plaintiffs have met
11:04 10 their burden of proof, you must find for the Plaintiffs.
11:04 11 If you find that Plaintiffs have not met their burden of
11:04 12 proof, you must find for Defendants.

11:04 13 And you will have on your verdict form
11:04 14 direct infringement. Then you will have for each
11:04 15 claim -- there are four, remember, a question of whether
11:04 16 Red Hat directly infringes and whether Novell correctly
11:04 17 -- directly infringes. Therefore, you will have eight
11:04 18 questions on direct infringement, one for each claim,
11:04 19 one for each of the Defendants.

11:04 20 On to indirect. Plaintiffs allege that
11:05 21 defendants are liable for infringement by actively
11:05 22 inducing their customers to directly infringe the
11:05 23 patents-in-suit. Defendants deny that they have
11:05 24 actively induced their customers to directly infringe
11:05 25 any of the asserted claims of the patents-in-suit.

11:05 1 Let's talk about the law there. As with
11:05 2 direct infringement, you must decide whether there's
11:05 3 been active inducement, and you're to do that on a
11:05 4 claim-by-claim basis.

11:05 5 In your active inducement analysis, you
11:05 6 will consider the following factors: Whether the
11:05 7 Defendants took action during the time of the patent
11:05 8 which was in force which encourages acts by someone
11:05 9 else, and the encouraged acts constituted direct
11:05 10 infringement of that claim, and Defendants were aware of
11:06 11 the patent and knew or should have known that the
11:06 12 encouraged acts constitute infringement of that patent,
11:06 13 and Defendants had an intent to cause those encouraged
11:06 14 acts, and the encouraged acts were actually carried out
11:06 15 by someone else.

11:06 16 To prove active inducement of
11:06 17 infringement, Plaintiffs must prove that each of those
11:06 18 requirements is met. Further, proof of each element
11:06 19 must be by preponderance of the evidence.

11:06 20 It's not sufficient that the person or
11:06 21 company that's allegedly induced to infringe itself
11:06 22 directly infringed the claims. Nor is it sufficient
11:06 23 that Defendants were aware of the acts that allegedly
11:06 24 constitute the direct infringement.

11:06 25 Rather, you must find that Defendants

11:06 1 specifically intended another person or company to
11:07 2 infringe the patent-in-suit and that such other person
11:07 3 or company actually engaged in the acts that constitute
11:07 4 direct infringement to find inducement of infringement.

11:07 5 If you do not find that Defendants
11:07 6 specifically intended another person or company to
11:07 7 infringe or if there's no direct infringement by anyone,
11:07 8 then you must find that Defendants have not actively
11:07 9 induced the alleged infringement.

11:07 10 Now, you'll have, again, the next eight
11:07 11 questions will be on inducement. There will be one
11:07 12 question for each claim and each Defendant. Does Red
11:07 13 Hat induce? Does Novell induce for each of the claims?
11:07 14 So there's another eight questions. There's 16 of the
11:07 15 23 questions already.

11:08 16 Next question. Validity. You'll have one
11:08 17 question on this. The Inventorship issue. First, the
11:08 18 parties' contentions. In this case, Defendants contend
11:08 19 that each of the patents-in-suit is invalid because of
11:08 20 improper Inventorship.

11:08 21 A patent is invalid if it fails to meet
11:08 22 the requirement that all of the actual inventors, and
11:08 23 only the actual inventors, be named as inventors in the
11:08 24 patent. This is known as the Inventorship requirement.
11:08 25 The inventors named in an issued patent are presumed

11:08 1 correct, and the Defendants must show improper
11:08 2 Inventorship by clear and convincing evidence.

11:08 3 Let me tell you the law there. A joint
11:08 4 invention is the product of collaboration of the
11:08 5 inventive endeavors of two or more persons working
11:08 6 towards the same end and producing an invention by their
11:09 7 aggregate efforts.

11:09 8 To constitute a joint invention, it's
11:09 9 necessary that each of the inventors work on the same
11:09 10 subject matter and make some contribution to the
11:09 11 inventive thought and the final result. Persons may be
11:09 12 joint or co-inventors even though they do not physically
11:09 13 work together, do not make the same type or amount of
11:09 14 contribution, or do not contribute to the subject matter
11:09 15 of every claim of the patent.

11:09 16 However, individuals cannot be joint
11:09 17 inventors if they are completely ignorant of what each
11:09 18 other has done until after their independent efforts.
11:09 19 They must have directly collaborated through some open
11:09 20 line of communication during or at approximately the
11:09 21 time of their inventive effort.

11:09 22 For persons to be joint inventors, there
11:09 23 must be some element of joint behavior such as
11:09 24 collaboration or working under common direction, one
11:09 25 inventor seeking -- seeing a relevant report and

11:09 1 building upon it or hearing another's suggestions at a
11:10 2 meeting.

11:10 3 In some cases, the interplay between
11:10 4 conception and collaboration requires that each
11:10 5 co-inventor engage with the other co-inventors to
11:10 6 contribute to a joint conception.

11:10 7 That's your instruction on the
11:10 8 Inventorship.

11:10 9 Now, there's another set of four questions
11:10 10 dealing with invalidity of each of the four claims by
11:10 11 anticipation. So you've got 17 so far and another
11:10 12 four -- math isn't my strong suit, but I think we're up
11:10 13 to 21.

11:10 14 We're now going to talk about the law
11:10 15 governing anticipation, the next four questions.

11:10 16 Defendants allege that all asserted claims
11:10 17 of the patents-in-suit are invalid because they are
11:11 18 anticipated by certain prior art references, products,
11:11 19 or systems.

11:11 20 Under the patent laws, a person is
11:11 21 entitled to a patent only if the invention claimed in
11:11 22 the patent is new in light of what came before. That
11:11 23 which came before is referred to as the prior art.

11:11 24 In this case, the following systems are
11:11 25 prior art, the Chan Room system, the Macintosh Switcher,

11:11 1 and the Amiga Workbench. Defendants allege that the
11:11 2 listed prior art contains all of the elements of each of
11:11 3 the claims, all four claims in this suit.

11:11 4 Defendants have the burden of establishing
11:11 5 by clear and convincing evidence that those claims are
11:11 6 not new. To prove that the inventions are not new,
11:11 7 Defend -- Defendants must show that all of the
11:11 8 requirements of each patent claim are present in a
11:12 9 single document or system that qualifies as prior art.

11:12 10 The Chan Room system, the Macintosh
11:12 11 Switcher, and the Amiga Workbench are prior art. So you
11:12 12 must consider this question for the Chan Room system,
11:12 13 Macintosh Switcher and Amiga Workbench.

11:12 14 If you find that Defendants established by
11:12 15 clear and convincing evidence that all of the elements
11:12 16 are contained in at least one of these documents or
11:12 17 systems, then you must find that the '412, '521 and '183
11:12 18 patents are invalid.

11:12 19 If you find the Defendants have not
11:12 20 carried their burden of proof, then you will find for
11:12 21 the Plaintiffs.

11:12 22 Something is inherent in an item of prior
11:12 23 art if it is necessarily present in that prior art or
11:12 24 necessarily results from the practice of the prior art.
11:12 25 Inherency may not be established by probabilities or

11:12 1 possibilities. The mere fact that a certain thing may
11:13 2 coincidentally result from a given set of circumstances
11:13 3 is not sufficient. A party claiming anticipation by
11:13 4 inherency must show that the elements of the claim are
11:13 5 necessarily present in the prior art or necessarily
11:13 6 result from the practice of the prior art.

11:13 7 Defendants must prove by clear and
11:13 8 convincing evidence that the inventions recited in these
11:13 9 claims of the patents-in-suit are inherently present in
11:13 10 the prior art.

11:13 11 I told you there were 23 questions. We're
11:13 12 up to 21. That means there are two left. You can guess
11:13 13 what those are. Damages on each of the -- for each of
11:13 14 the Defendants. Let's talk about damages generally.

11:13 15 Plaintiffs argue they're entitled to
11:13 16 damages in the form of a reasonable royalty based on
11:13 17 Defendants' infringement of the patents-in-suit. If you
11:14 18 find that Defendants infringed any valid claim of the
11:14 19 patents-in-suit, then you must determine the amount of
11:14 20 money damages, if any, to be awarded to the Plaintiffs.

11:14 21 The amount of those damages, if any, must
11:14 22 be adequate to compensate Plaintiffs for the
11:14 23 infringement, but in no event less than a reasonable
11:14 24 royalty for the use made of the invention by the
11:14 25 Defendants.

11:14 1 You may decide that the parties would have
11:14 2 agreed to a lump sum, paid-in-full royalty, or a running
11:14 3 royalty. The damages you award are meant to compensate
11:14 4 the patentholder. You may not include in your award any
11:14 5 additional amount as a fine or penalty in order to
11:14 6 punish Defendants.

11:14 7 Your damages award, if you even reach that
11:14 8 issue, should put Plaintiffs in approximately the same
11:14 9 financial position it would have been in had the
11:14 10 infringement not occurred, but in no event may the
11:15 11 damages be less than a reasonable royalty for the use
11:15 12 made of the invention.

11:15 13 Plaintiffs have the burden to establish
11:15 14 the amount of their damages by a preponderance of the
11:15 15 evidence. While Plaintiffs may not establish the amount
11:15 16 of damages by mere speculation or guess, they satisfy
11:15 17 their burden by showing the extent of damages as a
11:15 18 matter of just and reasonable inference, even if the
11:15 19 damages are established as an approximation.

11:15 20 Now, the time period. The damages period
11:15 21 in this case is from October 2007 through December 10th,
11:15 22 2008, October 9th to December 10th.

11:15 23 Plaintiffs cannot recover damages for any
11:15 24 activities of Red Hat or Novell that are alleged to
11:15 25 infringe the patents-in-suit that occurred before the

11:15 1 Plaintiffs filed this lawsuit, and the patents-in-suit
11:15 2 expired on December 10, 2008.

11:15 3 Now, let's talk about reasonable royalty.
11:16 4 A royalty is a payment made to a patentholder in
11:16 5 exchange for the right to make, use, or sell the claimed
11:16 6 invention. A reasonable royalty is the amount of
11:16 7 royalty payment that a patentholder and the infringer
11:16 8 would have agreed to in a hypothetical negotiation
11:16 9 taking place at a time when the infringement first
11:16 10 began.

11:16 11 In considering this hypothetical
11:16 12 negotiation, you should focus on what the expectations
11:16 13 of the patentholder and the infringer would have been
11:16 14 had they entered into an agreement at that time and had
11:16 15 they acted reasonably in their negotiations.

11:16 16 You must also assume that both parties
11:16 17 believed the patent was valid and infringed. In
11:16 18 addition, you must assume that the patentholder and
11:16 19 infringer were willing to enter into an agreement. Your
11:16 20 role is to determine what that agreement would have
11:16 21 been.

11:16 22 The measure of damages is what royalty
11:16 23 would have resulted from the hypothetical negotiation
11:17 24 and not simply what royalty either party would have
11:17 25 preferred. It's negotiation, remember.

11:17 1 In this trial, you have heard evidence of
11:17 2 things that happened after the infringement began. That
11:17 3 evidence can be considered only to the extent that the
11:17 4 evidence aids you in assessing what royalty would have
11:17 5 resulted from a hypothetical negotiation.

11:17 6 With respect to the license agreement
11:17 7 entered into between Apple and Plaintiffs, you should
11:17 8 keep in mind that when Plaintiffs sued Apple, the law
11:17 9 allowed Plaintiffs to receive damages for at least
11:17 10 Apple's internal use that predated the filing of the
11:17 11 lawsuit by six years in addition to the 1.5 years that
11:17 12 were left on the life of the patents.

11:17 13 If you find any claim of the
11:17 14 patents-in-suit to be infringed and valid, you must
11:18 15 decide the amount of damages in the form of a reasonable
11:18 16 royalty you find Plaintiffs have proven by a
11:18 17 preponderance of the evidence. You may decide that
11:18 18 Plaintiffs and Defendants would have agreed to a lump
11:18 19 sum, paid-in-full royalty at the -- at the hypothetical
11:18 20 negotiation. Alternatively, you may decide that they
11:18 21 would have agreed to a running royalty.

11:18 22 To decide an amount based on a running
11:18 23 royalty, you must first decide the approximate (sic)
11:18 24 royalty base. If you decide to apply a royalty on a per
11:18 25 unit base, the royalty base can be the number of

11:18 1 infringing units distributed. Where a patent
11:18 2 contributes only part of the value of a larger product,
11:18 3 a patentee's damages are generally limited to the part
11:18 4 of the value created by the patent.

11:18 5 In determining the reasonable royalty, you
11:18 6 should consider all of the facts known and available to
11:18 7 the parties at the time the infringement began.

11:18 8 Some of the factors you may consider in
11:19 9 making your determination are: The royalties received
11:19 10 by the patentholder for the licensing of the
11:19 11 patents-in-suit tending to prove an established royalty
11:19 12 at the time, the nature and scope of those existing
11:19 13 licenses as exclusive or nonexclusive or as restricted
11:19 14 or nonrestricted in terms of territory if -- or with
11:19 15 respect to whom the manufactured product may be sold;
11:19 16 the effect of selling the patented specialty in
11:19 17 promoting sales of other products of the licensee, the
11:19 18 existing value of the invention to the licensor as a
11:19 19 generator of sales of nonpatented items and the extent
11:19 20 of such derivative or convoyed sales; the duration of
11:19 21 the patent and the term of the license; the nature of
11:19 22 the patented invention and the benefits to those who
11:19 23 would have used the invention; the extent to which the
11:20 24 invention -- the infringer has made use of the invention
11:20 25 and any evidence probative of the value of that use; the

11:20 1 opinion and testimony of qualified experts; or any other
11:20 2 factors which in your mind would have increased or
11:20 3 decreased the royalty the infringer would have been
11:20 4 willing to pay and the patentholder would have been
11:20 5 willing to accept, acting as normally prudent business
11:20 6 people.

11:20 7 All right. That covers damages.

11:20 8 Now I have a few instructions for how you
11:20 9 reach your verdict. That concludes the part of my
11:20 10 instructions explaining the rules for considering the
11:20 11 testimony and the evidence. Now let me tell you how you
11:20 12 conduct your deliberations and your possible verdicts.

11:20 13 Counsel for Plaintiffs and Defendants will
11:20 14 now make their closing statements. Once they complete
11:20 15 their statements, that's your time to start deliberating
11:21 16 in the jury room. In fact, it's your duty to talk with
11:21 17 each other about the evidence and make every reasonable
11:21 18 effort you can to reach unanimous agreement.

11:21 19 Each of you must decide the case for
11:21 20 yourself, but do so only after an impartial
11:21 21 consideration of the evidence with your fellow jurors.
11:21 22 Your verdict, after all, however, must be unanimous.

11:21 23 After you are released to the jury room,
11:21 24 you shall select one of your member of the jury as the
11:21 25 foreperson. The foreperson will preside over the

11:21 1 deliberations and speak for you when you return here to
11:21 2 Court. After that, you should begin your deliberations.

11:21 3 Once you start deliberating, do not talk
11:21 4 to the jury officer or to me or to anyone except each
11:21 5 other about the case. If you have any questions or
11:21 6 messages, you must write them down on a piece of paper,
11:22 7 sign them, and give them to the Marshal.

11:22 8 Jan, who will that be? There will be a
11:22 9 Marshal outside the door. Knock on the door, he will
11:22 10 answer, you will give him the written question, and he
11:22 11 will give them to me, and I will respond as soon as I
11:22 12 can. I may want to speak to counsel about what you've
11:22 13 asked, so it may take a little time to get back to you.
11:22 14 You can continue your deliberations while you're
11:22 15 waiting.

11:22 16 Any questions or messages normally should
11:22 17 be sent to me through your foreperson. Do not ever
11:22 18 write down or tell anyone how you stand on your votes.
11:22 19 For example, do not write down or tell anyone that you
11:22 20 are split 8 to 3 or 6 to 5 or whatever your vote happens
11:22 21 to be. That should stay secret until you are finished.

11:22 22 A verdict form has been prepared for you.
11:23 23 I told you that. The verdict form contains all the
11:23 24 questions that we've gone over. After you've reached
11:23 25 the unanimous agreement on a verdict, your foreperson

11:23 1 will fill in the verdict form, sign it, date it, and
11:23 2 advise the Court you've reached a verdict.

11:23 3 Let me finish by repeating something I
11:23 4 said earlier. Nothing I've said or done during this
11:23 5 trial was meant to influence your decision in any way.
11:23 6 You must decide this case yourselves based on the
11:23 7 evidence presented. Once the lawyers have finished
11:23 8 their closing statements, I will release you to the jury
11:23 9 room.

11:23 10 The exhibits are already there for your
11:23 11 consultation. Before you stop your deliberations this
11:23 12 evening, you should request my permission to leave. If
11:23 13 you've not reached a verdict this evening, you should be
11:23 14 here tomorrow morning promptly at 9:00 a.m. to begin
11:23 15 your deliberation for a second day, if that is
11:24 16 necessary, and so on until your verdict is reached.

11:24 17 That final sentence just says thank you,
11:24 18 and that's not enough. You should feel proud of
11:24 19 yourselves. This is your duty, but you've done it very
11:24 20 well.

11:24 21 Counsel?

11:24 22 MR. REITER: Your Honor, may I approach?

11:24 23 THE COURT: Yes, you may.

11:24 24 (Bench conference.)

11:24 25 MR. REITER: Your Honor, I'm sorry, there

11:24 1 was just one statement, you read, you must first decide
11:24 2 the approximate royalty basis. It reads appropriate.
11:24 3 Given all the issues --

11:24 4 THE COURT: I'll reread it.

11:24 5 MR. REITER: Okay.

11:24 6 THE COURT: What page?

11:24 7 MR. REITER: Page 14. You said,
11:24 8 approximate. It should be appropriate.

11:24 9 THE COURT: Okay.

11:25 10 (Bench conference concluded.)

11:25 11 THE COURT: I need to re-read a sentence
11:25 12 because I made a mistake.

11:25 13 To decide on an amount based on a running
11:25 14 royalty, you must first decide the approximate royalty
11:25 15 base. I think I said appropriate.

11:25 16 MR. REITER: No, it's appropriate.

11:25 17 THE COURT: Oh, excuse me. Let me say
11:25 18 that again.

11:25 19 To decide on an amount based on a running
11:25 20 royalty, you must first decide the appropriate royalty
11:25 21 base, the appropriate royalty base.

11:25 22 I misread it because -- it was my mistake.
11:25 23 Appropriate is what you're deciding.

11:26 24 MR. GASEY: Your Honor, one other issue.
11:26 25 May I approach?

11:26 1 THE COURT: Yes, you certainly may.

11:26 2 (Bench conference.)

11:26 3 MR. GASEY: This is a matter of mechanics
11:26 4 or fairness. I just wonder if -- if we're going to all
11:26 5 do our closing before lunch -- before breaking for
11:26 6 lunch, that's fine. I just don't want to have it where
11:26 7 I'm doing my closing and then they get lunch.

11:26 8 THE COURT: No, it's a fair point. Do
11:26 9 both or let's decide that right now.

11:26 10 MR. GASEY: Right. Right.

11:26 11 THE COURT: So let's decide that right
11:26 12 now. I'd -- I'd propose to just kind of ask the jury
11:26 13 what they want to do. If they want to go two hours now
11:26 14 or --

11:26 15 MR. KREVITT: We -- we should take a
11:26 16 break.

11:26 17 THE COURT: Do they want to go two hours
11:26 18 now before lunch? Let's ask them.

11:26 19 MR. GASEY: Sure.

11:26 20 THE COURT: Okay.

11:26 21 (Bench conference concluded.)

11:26 22 THE COURT: This is that point where we're
11:26 23 going to make some decisions, and I'm going to do an
11:26 24 unusual thing, and that is, consult my jury.

11:26 25 Now, you're not allowed to speak in Court,

11:26 1 but you can nod your heads or shake your heads. And
11:27 2 what I'm inquiring is each Counsel has an hour. We have
11:27 3 two alternatives. We can take a break, ten minutes,
11:27 4 return and do two hours of their closing statements,
11:27 5 with a slight break in between each one, and then you
11:27 6 would retire to begin your deliberations and eat lunch.

11:27 7 Or the alternative is we could have lunch
11:27 8 now, return, do our two hours, and then I will release
11:27 9 you to begin your deliberations. The question is do you
11:27 10 want lunch now or at 1:30, approximately?

11:27 11 How many are -- how many by the nod system
11:27 12 are for eating lunch now? How many want to eat lunch at
11:28 13 1:30? I think I saw a preponderance of nods in favor of
11:28 14 1:30. But I promised you a break. Let's take a break
11:28 15 now, we'll come back, and we'll hear from counsel.
11:29 16 Five, ten minutes.

11:29 17 (Jury out.)

11:29 18 MR. GASEY: I wasn't sure if Your Honor
11:29 19 wanted to go through the remaining exhibits now.

11:29 20 THE COURT: Yeah, let's do that. We might
11:29 21 as well do it now. We need them on the record.

11:29 22 Mr. Stewart?

11:30 23 All right, Ms. Dickman, you're going to
11:30 24 talk to me.

11:30 25 MS. DICKMAN: Plaintiffs would like to

11:30 1 offer the following exhibits to be admitted into
11:30 2 evidence, PX317.

11:30 3 MR. STEWART: We have an objection.

11:30 4 THE COURT: 317, just a second. I've got
11:30 5 to write down. Okay. Go ahead.

11:30 6 MS. DICKMAN: PX285, PX278.

11:30 7 MR. STEWART: I'm sorry. Was that 278?

11:30 8 MS. DICKMAN: Yep. PX279.

11:30 9 MR. STEWART: We have an objection with
11:30 10 that one.

11:30 11 THE COURT: Got it.

11:30 12 MS. DICKMAN: Mr. Vickrey said DX997, but
11:30 13 what was actually put up was DX809. So we'd like to
11:30 14 offer 809.

11:31 15 THE COURT: Okay. 809.

11:31 16 MR. STEWART: Your Honor, if I may real
11:31 17 quick, I didn't have 278 on there, and I believe we
11:31 18 would have an objection with that, as well.

11:31 19 THE COURT: I'm not clear, Mr. Stewart.
11:31 20 Which one do you have an objection to?

11:31 21 MR. STEWART: 278, 279, and 317 thus far.

11:31 22 THE COURT: Okay. Good. But not 809?

11:31 23 MR. STEWART: Correct.

11:31 24 THE COURT: Thank you.

11:31 25 MS. DICKMAN: One other we'd like to offer

11:31 1 PX316.

11:31 2 MR. STEWART: We'll have an objection to
11:31 3 that.

11:31 4 MS. DICKMAN: It was already admitted.

11:31 5 THE COURT: I need to hear your objections
11:31 6 on 317, 278 and 9.

11:31 7 MR. REITER: These are articles that came
11:31 8 up with Mr. Gemini. We had raised objections already on
11:31 9 hearsay grounds. You sustained the objections. I think
11:31 10 they just came up again with Dr. Putnam.

11:31 11 THE COURT: They were used for
11:31 12 impeachment, and they were appropriate in that context.

11:31 13 MR. REITER: I don't know if it was
11:31 14 impeachment, but just to talk about -- like a Ubuntu
11:31 15 article, that kind of thing.

11:31 16 THE COURT: I think I had earlier --

11:32 17 MR. REITER: Sustained.

11:32 18 THE COURT: -- not admitted those. Which
11:32 19 ones were those?

11:32 20 MR. STEWART: 279 -- 278, 279 and 317.

11:32 21 THE COURT : Okay. Good. Then those are
11:32 22 not admitted.

11:32 23 Mr. Stewart, do you have something for me?

11:32 24 MR. STEWART: Yes. The Defendants would
11:32 25 like to offer DX739, DX740, DX770, DX773, DX904, and

11:32 1 DX936.

11:32 2 MS. DICKMAN: We object to DX936.

11:32 3 THE COURT: 936. Mr. Gibbons, is that
11:32 4 you?

11:32 5 MR. GIBBONS: Dr. Putnam's report.

11:32 6 THE COURT: That's what?

11:32 7 MR. GIBBONS: That's Dr. Putnam's report.

11:32 8 MR. REITER: That's the whole report?

11:32 9 MS. DICKMAN: Yeah.

11:32 10 MR. REITER: Okay. We're not going to
11:32 11 offer it.

11:32 12 THE COURT: Okay. Then 936 is not
11:32 13 permitted.

11:32 14 MS. DICKMAN: Thank you, Your Honor.

11:32 15 THE COURT: And we now have a complete
11:32 16 record, right?

11:32 17 MS. DICKMAN: Yes, Your Honor.

11:32 18 THE COURT: And Ms. Dickman and Mr.
11:33 19 Stewart will go into the hall, extract from the boxes
11:33 20 everything which has not been admitted, they'll check
11:33 21 each other, and then the boxes will be in the jury room
11:33 22 when they go back in.

11:33 23 COURT ROOM DEPUTY: Will I get a complete
11:33 24 list of the exhibits?

11:33 25 MS. DICKMAN: As they're being admitted?

11:33 1 COURT ROOM DEPUTY: Yes. I need --

11:33 2 MS. DICKMAN: I think ours is complete
11:33 3 already because the things that were not permitted were
11:33 4 not on our list, and the things that were permitted were
11:33 5 already admitted for us.

11:33 6 COURT ROOM DEPUTY: So everything from
11:33 7 yesterday is correct that I have.

11:33 8 MS. DICKMAN: Yes. Yes, ma'am.

11:33 9 MR. STEWART: I'll have to check on it.

11:33 10 MR. GIBBONS: Your Honor, should we start
11:33 11 pulling these boxes out of the courtroom right now?

11:33 12 THE COURT: Yes, please do.

11:33 13 MS. DICKMAN: Would you like us to leave
11:33 14 the exhibits that are going back there in the boxes,
11:33 15 because I think the larger --

11:33 16 THE COURT: Yes.

11:33 17 MS. DICKMAN: -- volume is what's not
11:33 18 going back --

11:33 19 MR. REITER: It's not going to be much.

11:33 20 MS. DICKMAN: Yeah.

11:33 21 MR. REITER: How many exhibits do we have
11:33 22 total?

11:33 23 MS. DICKMAN: I think you guys have maybe
11:33 24 30, and we have maybe 70.

11:33 25 THE COURT: I'll trust -- I'll trust your

11:33 1 judgment, Mr. Stewart and Ms. Dickman about -- maybe you
11:34 2 can put them all in a box or two and send them back.

11:34 3 MR. GIBBONS: You know, once -- once the
11:34 4 jury is dismissed to begin deliberation, we can pull the
11:34 5 boxes in here and then bring them in --

11:34 6 THE COURT: It would be nice if they were
11:34 7 in there already.

11:34 8 MR. GIBBONS: We can do that, too.

11:34 9 THE COURT: Yeah, do that. Just have them
11:34 10 in there.

11:34 11 MR. GIBBONS: Fair enough.

11:34 12 THE COURT: And --

11:34 13 MR. GASEY: One exception, Your Honor,
11:34 14 because I'd like to reference them in the close, would
11:34 15 be the original diskettes.

11:34 16 THE COURT: Oh, yeah, yeah, anything
11:34 17 that's going to be used, absolutely.

11:34 18 MR. GASEY: Thank you.

11:34 19 THE COURT: By either one. Okay. Give me
11:34 20 a minute and then we'll start.

11:34 21 (Recess.)

11:34 22 (Jury in.)

23 THE COURT: Please be seated.

11:42 24 Mr. Gasey?

11:42 25 MR. GASEY: Yes, Your Honor. I'm going to

11:42 1 do the closing. I promise I'll take less than 40
11:42 2 minutes. I promise. I promise. And then my co-counsel
11:42 3 will go ahead and do the rebuttal with the remainder of
11:42 4 the time.

11:42 5 THE COURT: That will be fine.

11:42 6 MR. GASEY: Thank you, Your Honor.

11:43 7 Good morning again. This is a case about
11:43 8 the fundamental clash between the Defendants, leaders of
11:43 9 the open-source community, and my clients, the patent
11:43 10 owners. This clash, of course, is over whether they
11:43 11 have the right to use and distribute --

11:43 12 THE COURT: Excuse me, Mr. Gasey. Just a
11:43 13 matter of record, you can stand wherever you want, but
11:43 14 could I put a mic in your hand?

11:43 15 MR. GASEY: Too soft?

11:43 16 THE COURT: Well, no, you sound just
11:43 17 great, but we record everything, and believe it or not,
11:43 18 what you say is important.

11:43 19 MR. GASEY: Can I have Your Honor talk to
11:43 20 my wife?

11:43 21 THE COURT: I'm not going that far.

11:43 22 MR. GASEY: This clash -- this case is
11:43 23 over whether or not the Defendants have the right to use
11:43 24 and distribute what is provided for, what is protected
11:43 25 in other people's patents, my clients' property, without

11:44 1 paying for it.

11:44 2 Now, this is the part of the case where
11:44 3 you're going to have to decide a lot of different
11:44 4 questions. The Judge has pointed out that there's 23
11:44 5 different questions that you're going have to answer.

11:44 6 Now, there's going to be four basic
11:44 7 issues -- Ms. Harper, go ahead and put up Slide 2?

11:44 8 Four basic issues that you're going to
11:44 9 have to decide, the first of which is infringement; the
11:44 10 second of which deals with validity, and part of that is
11:44 11 the issue of Inventorship; and then finally is the issue
11:44 12 of damages.

11:44 13 Now, I'm going to go ahead and try and
11:44 14 walk through the actual verdict form that you're going
11:44 15 to be sent back to go ahead and deliberate with. And
11:44 16 part of the -- part of the purpose of this is to go
11:44 17 ahead and organize my thoughts in summary that I'd like
11:44 18 you to keep in mind as you're going through deciding the
11:45 19 questions that it is your duty to figure out. You are
11:45 20 the judges of those issues.

11:45 21 Now, the first issue that you're going to
11:45 22 be deciding on your verdict form is the issue of
11:45 23 damages -- excuse me -- the issues of infringement. I'm
11:45 24 sorry.

11:45 25 As the Judge mentioned, there is going to

11:45 1 be a series of a total of 16 questions. The first eight
11:45 2 questions are broken down on a claim-by-claim basis, one
11:45 3 claim for each Defendant. So Claim 1 for the '412
11:45 4 patent, the question is whether or not it's infringed by
11:45 5 the Plaintiffs -- excuse me -- by Novell, whether or not
11:45 6 it's infringed by Red Hat.

11:45 7 And then it goes through Claim 21 for the
11:46 8 same question. Then it goes through Claim 8 of the '521
11:46 9 patent, and finally it goes through Claim 1 of the '183
11:46 10 patent. All the same question, whether or not by a
11:46 11 preponderance of the evidence, 50/50 plus one tiny bit
11:46 12 favors my clients.

11:46 13 If that's the case, if that burden is met,
11:46 14 then there's infringement. And the reason why there are
11:46 15 separate questions is because each claim, remember, is
11:46 16 its own separate piece of property. It's got its own
11:46 17 separate boundaries, its own separate rights.

11:46 18 You can find infringement of some claims
11:46 19 or not others, and the same holds true for validity as
11:46 20 well. There's a different scope, a different fence
11:46 21 around the yard.

11:46 22 Now, direct infringement can be shown a
11:46 23 number of different ways. The evidence that we have
11:46 24 presented and that shows direct infringement by the
11:47 25 Defendants is use of the software in an infringing

11:47 1 method or in an infringing system.

11:47 2 What does that mean?

11:47 3 What that means is, the Novell and Red Hat
11:47 4 software has been used by the Defendants in such a
11:47 5 matter to go ahead and infringe each of the different
11:47 6 claims. They've been used in computers with displays
11:47 7 and with keyboards and have been used in the switching
11:47 8 feature that goes ahead and reads on the asserted
11:47 9 claims.

11:47 10 And there's going to be several different
11:47 11 types of evidence on this, and obviously because I
11:47 12 really do want to try and move along, there's only going
11:47 13 to be a few different points I'm going to show. But the
11:47 14 jury instructions that the Judge showed you and read to
11:47 15 you indicated that there's two different types of
11:47 16 evidence.

11:47 17 And there's direct evidence, such as shown
11:47 18 by testimony of an eyewitness, and the other type of
11:48 19 evidence is what's called circumstantial evidence, the
11:48 20 proof of circumstances that tend to prove or disprove
11:48 21 the existence or non-existence of certain other facts.

11:48 22 I think an easy way to go ahead and give
11:48 23 an example of what that sort of circumstantial evidence
11:48 24 means is an example of, if you were to go to some kind
11:48 25 of tropical island, you felt you discovered it first,

11:48 1 and you wanted to see if there had been any humans there
11:48 2 before. Now, you might see a human; you might see a
11:48 3 person walking around on the beach, and you would know
11:48 4 that's direct evidence. You are the eyewitness to that
11:48 5 fact.

11:48 6 But there's also a possibility that you
11:48 7 might not see anybody. There might not be any direct
11:48 8 evidence, but you might see a footprint in the sand.
11:48 9 And using your common sense, you're going to realize
11:48 10 that there's a person that's there or at least that has
11:48 11 been there. That's that kind of circumstantial
11:48 12 evidence.

11:48 13 The direct evidence and the circumstantial
11:48 14 evidence supports the infringement of the claims
11:49 15 asserted in this case.

11:49 16 Now, first the direct evidence. On
11:49 17 Tuesday afternoon, I think it was, my co-counsel,
11:49 18 Mr. Gibbons, went ahead and read in some deposition
11:49 19 testimony. We tried to be brief, and I know that it has
11:49 20 a different effect versus seeing somebody live, but it
11:49 21 is direct evidence. It is direct commentary by the
11:49 22 Defendants' witnesses.

11:49 23 Now, one of the witnesses you heard
11:49 24 from -- I'll put it up on the ELMO.

11:49 25 Now, one of the witnesses that you heard

11:49 1 from was a gentleman by the name of Markus Rex. Mr. Rex
11:50 2 testified in his deposition as follows -- well, there's
11:50 3 testimony from Mr. Rex where he testified he used -- do
11:50 4 you remember the spinning cube examples that were shown?

11:50 5 He testified that he used the spinning
11:50 6 cube. If you recall from notes that you took during his
11:50 7 deposition that was read in on Tuesday, he testified
11:50 8 that he used the spinning cube, and he used a keyboard
11:51 9 to go ahead and switch from face to face.

11:51 10 In other words, he directly infringed --
11:51 11 here we go, Slide 20. Thank you.

11:51 12 Mr. Rex testified: When I've used the
11:51 13 cube as an individual user, I switched one of two ways.
11:51 14 Control alt -- and that's a keyboard command -- right
11:51 15 arrow, slash, left arrow. In other words, he went ahead
11:51 16 and clicked on the cube itself on the screen. So in
11:51 17 other words, he used it on a system that had a screen,
11:51 18 that had a keyboard, an input means, and he went ahead
11:51 19 and used it in an infringing manner, switching from one
11:51 20 workspace to another.

11:51 21 He's not the only person, though. We have
11:51 22 testimony from Matthias Clasen. Now he is a senior
11:51 23 engineering representative of Defendant Red Hat, but Red
11:51 24 Hat, for whatever reason, decided to call him here
11:51 25 today. So we went ahead and read his testimony in as

11:51 1 well on Tuesday afternoon.

11:52 2 What he testified to, you may recall, is
11:52 3 testing that he performed as work on behalf of Red Hat.
11:52 4 And he tested the graphical user interface, the GUI, to
11:52 5 start the computer and check that the graphical user
11:52 6 interface is in front of him.

11:52 7 What he further testified to is that he
11:52 8 tested each and every user function on the screen. That
11:52 9 includes the switching function. He is another example
11:52 10 of direct infringement by the Defendants.

11:52 11 There's a third example of infringement
11:52 12 that was read in in that testimony by a marketing
11:52 13 representative, a gentleman by the name of Mr. Justin
11:52 14 Steinman. You heard him live on Thursday, but you also
11:52 15 heard his deposition testimony on Tuesday afternoon.

11:52 16 And he testified as follows: When you use
11:52 17 the Novell product and you're clicking from desktop to
11:52 18 desktop with your mouse, do you click on the icons?

11:53 19 Answer: I actually use the keyboard
11:53 20 personally.

11:53 21 You're clicking on the icons, right?

11:53 22 Yes. Sometimes I click on the icons, yes.

11:53 23 He's another user. We have evidence from
11:53 24 the users themselves, from the Defendants themselves an
11:53 25 admission that they go ahead and use the product in the

11:53 1 infringing manner.

11:53 2 We also have circumstantial evidence
11:53 3 showing the use of the product by the Defendants, and
11:53 4 we'll get into that in a little bit, because that also
11:53 5 applies to the other legal standard for infringement,
11:53 6 inducement of infringement.

11:53 7 What does that evidence include?

11:53 8 It includes things like product
11:53 9 literature, training materials, instructions. And
11:53 10 you'll see from the actual instruction manuals, the user
11:53 11 guides and other materials that you'll be able to take
11:53 12 back with you to the jury room, they show things like
11:53 13 screen shots showing the actual product in use.

11:53 14 The only way that they created those kinds
11:54 15 of screen shots, those kinds of things with a switching
11:54 16 windows, was for somebody to go ahead and use the
11:54 17 product in an infringing manner. It's circumstantial
11:54 18 evidence showing that somebody at Novell, somebody at
11:54 19 Red Hat went ahead and used the product in an infringing
11:54 20 manner to help create the product literature that
11:54 21 encourages their customers to go ahead and infringe.

11:54 22 Here's an example. You've got
11:54 23 descriptions of the Novell rotating cube. It talks
11:54 24 about the ability and walking through the steps of how
11:54 25 to go ahead and move around the cube and go switch from

11:54 1 desktop to desktop, to switch from workspace to
11:54 2 workspace.

11:54 3 Now, we also have the issue of inducement.
11:54 4 Inducement, as the Court pointed out to you, involves a
11:54 5 series of steps. I'll read them from the Judge's jury
11:55 6 instructions. Inducement involves five different
11:55 7 points. That the Defendants took action during the time
11:55 8 period when the patent was in force that encouraged acts
11:55 9 by somebody else;

11:55 10 Second, that they encouraged acts that
11:55 11 constituted direct infringement. In other words, they
11:55 12 encouraged people to go ahead and use their products in
11:55 13 an infringing manner;

11:55 14 That -- third, that the Defendants knew or
11:55 15 were aware of the patent and knew or should have known
11:55 16 that what they encouraged their customers -- what they
11:55 17 encouraged the people that received their software to
11:55 18 do, that those acts would constitute infringement.

11:55 19 And that the Defendants had an intent to
11:55 20 cause the encouraged acts. In other words, they wanted
11:55 21 to cause their customers, the people that received their
11:55 22 software to use that software in that way.

11:56 23 And that finally that their encouraged
11:56 24 acts were actually carried out by somebody else.

11:56 25 Now, some of the evidence you need to keep

11:56 1 in mind as we go through these points. These -- by the
11:56 2 way, these questions are Questions 9 through 16 on your
11:56 3 verdict form. They deal with inducement as opposed to
11:56 4 direct infringement, but otherwise they track the same
11:56 5 claims that are found on Questions 1 through 8 of your
11:56 6 verdict form.

11:56 7 Some of the evidence that you need to
11:56 8 consider when you're looking at what constitutes
11:56 9 inducement, I think, frankly, a good example, a very
11:56 10 good example of that is you remember when we heard
11:56 11 evidence about Novell and their efforts. They spent
11:56 12 1500 hours of video time studying and looking at and
11:57 13 encouraging their users to figure out ways for their
11:57 14 users to better use their products, to take the features
11:57 15 that they wanted to work well and incorporate them into
11:57 16 their products and fix what didn't work as well.

11:57 17 One of the things that they went ahead and
11:57 18 would promote that encouragement through was through
11:57 19 videotaping users, monitoring their use, creating tests
11:57 20 analyzing their use, and posting the results so people
11:57 21 could go ahead and see the dozens of different features
11:57 22 in their accused products and their accused software and
11:57 23 see how people would use it, see how people could figure
11:57 24 out how to better take advantage of each of those
11:57 25 features. And one of those features was the ability to

11:57 1 go ahead and switch desktops.

11:57 2 Would you go ahead and play that video?

11:57 3 (Video played.)

09:11 4 QUESTION: Can you move this picture to
09:11 5 the part of the cube that has the other insets.

09:11 6 ANSWER: Let's first see where it is.

09:11 7 Control alt.

09:11 8 Uh-huh, there maybe it's this. I wonder
09:11 9 what would happen if I just kind of drag this window to
09:11 10 the right.

09:11 11 Aha. There we go. Wow.

11:58 12 (End of video clip.)

11:58 13 MR. GASEY: There's an example. There's a
11:58 14 website, videotape on that website, reports about that
11:58 15 videotape on that website, all sponsored by Novell to go
11:58 16 ahead and physically have somebody sitting there and
11:58 17 instructing somebody how to use the accused device, how
11:58 18 to go ahead and take advantage of the switching feature.

11:58 19 That is the kind of evidence that supports
11:58 20 inducement of infringement of these claims.

11:59 21 Now, it's not just looking at pictures.
11:59 22 The words of the claims matter.

11:59 23 If you could go ahead and go to Slide 15.

11:59 24 We won't go through the element-by-element
11:59 25 process, because we want to make good use of time.

11:59 1 But you'll recall when Dr. Zimmerman was
11:59 2 up on the stand and went through the claims in an
11:59 3 element-by-element analysis. And that's going to be
11:59 4 part of your duty. Part of your job today is to go
11:59 5 ahead and look at each element of each asserted claim
11:59 6 and compare that with what is in Red Hat's and Novell's
11:59 7 systems.

11:59 8 And for those claim elements for which
11:59 9 Novell and Red Hat do not distribute themselves, you
11:59 10 need to consider two questions.

11:59 11 For direct infringement, do they use their
11:59 12 software and systems that include displays, systems that
11:59 13 include user input devices, things like mice and
12:00 14 keyboards, or do they go ahead and encourage their
12:00 15 customers to go ahead and use their software in such
12:00 16 systems?

12:00 17 Now, the Defendants are going to point out
12:00 18 a bunch of defenses. I think they boil down to about
12:00 19 three big issues. The first one -- go to Slide 39 -- is
12:00 20 they say, you know what, we don't use any displays. We
12:00 21 have all sorts of servers, and those servers are just
12:00 22 big boxes, and nobody can go ahead and see an image on
12:00 23 those big boxes. You've got big corporate data centers.

12:00 24 You heard evidence from one of the
12:00 25 witnesses, testimony from them that there was a server

12:00 1 center that was as big as Texas Stadium.

12:00 2 The question you need to ask yourself is,
12:00 3 who do you think puts that material on their servers?

12:00 4 The people that put that kind of material
12:01 5 on their servers are folks that are known generally as
12:01 6 system administrators. And what they need to do in
12:01 7 order to put that material on -- go to Slide 41 -- is
12:01 8 they need to have a computer interface.

12:01 9 Now, sometimes it may be remote; sometimes
12:01 10 it may be local, but the point is, the thing that's
12:01 11 relevant is they need to have a display to go ahead and
12:01 12 see how things are getting installed.

12:01 13 And that display, when it's provided using
12:01 14 the Defendants' software, includes a switching feature
12:01 15 such as what infringes the claims of these
12:01 16 patents-in-suit.

12:01 17 Now, you remember also hearing a lot of
12:01 18 testimony about the fact that Fedora and openSUSE are
12:01 19 training grounds. I think they're even referred to by
12:01 20 the Defendants or their lawyers as a training camp to go
12:01 21 ahead and see who makes the cut.

12:01 22 The question you need to ask is, if this
12:01 23 is a feature that made the cut -- remember, there are
12:01 24 separate products for the desktop software and the
12:02 25 server software. It was a feature that they didn't

12:02 1 really need. In other words, if the GNOME, the
12:02 2 graphical user interface that provides the windows
12:02 3 environment for operating in this fashion wasn't
12:02 4 necessary, why would they offer it in a server software
12:02 5 package?

12:02 6 Second defense the Defendants have --
12:02 7 really, they're related defenses. You heard a lot of
12:02 8 talk about flexibility and continuity. They had a
12:02 9 series of demonstrations and PowerPoints going ahead and
12:02 10 showing how there was no continuity between different
12:02 11 workspaces, that things weren't perceptible as the same
12:02 12 tool.

12:02 13 And the thing you need to keep in mind,
12:02 14 the thing that's contained within your jury instructions
12:02 15 is words. In patent law and patent claims words count.
12:02 16 There's two sources of words you need to consider in
12:02 17 this case.

12:02 18 One is the patent claim language itself.

12:03 19 If we could go to -- let's go back to the
12:03 20 Slide 15.

12:03 21 You've got claim language that's unique to
12:03 22 each of the claims. There's some overlapping terms, but
12:03 23 each of them are unique on their own. And you heard
12:03 24 testimony from Dr. Gray during his -- I think it's
12:03 25 Mr. Gray actually -- during his cross-examination where

12:03 1 he admitted that when you look at all the claims
12:03 2 asserted in all the patents, there isn't one of them
12:03 3 that uses the word flexibility or the word continuous --
12:03 4 or continuity.

12:03 5 It's something that is outside the
12:03 6 boundaries of the claims. Again, if you think about
12:03 7 each claim as a fence defining a piece of property,
12:03 8 they're going ahead and trying to take something that's
12:03 9 outside the fence and put it in to differentiate what
12:03 10 the claims call for, what the scope of the property is.

12:03 11 A second source of evidence that -- or a
12:04 12 second source that you need to consider when you're
12:04 13 looking at this language to consider what words matter,
12:04 14 and that's the Court's claim construction. You're going
12:04 15 to get a schedule along with your jury instructions that
12:04 16 lay out the interpretations of the terms.

12:04 17 And nowhere in those interpretations are
12:04 18 you going to find any reference to flexibility and
12:04 19 continuity. You need to use the language of the claims,
12:04 20 and you need to use the Court's instruction, the Court's
12:04 21 interpretation of those claims that's been given to you.

12:04 22 And none of that matters at all with
12:04 23 respect to flexibility and continuity.

12:04 24 Now, when it comes to the issue of
12:04 25 infringement and comparing on an element-by-element

12:04 1 basis, you also need to consider some of the evidence
12:04 2 that was presented by Dr. Zimmerman.

12:04 3 For instance, things like the -- remember
12:04 4 the calendar example that Dr. Zimmerman talked about?
12:05 5 Dr. Zimmerman went ahead and showed an example like
12:05 6 what's up on the screen there that showed two different
12:05 7 workspaces, two different desktops.

12:05 8 Now, the Defendants' technical expert made
12:05 9 a big deal to say, look, it's really just one object;
12:05 10 there's just a series of switches that things turn on
12:05 11 and off; things don't really change.

12:05 12 If they don't really change, how is it
12:05 13 that you can go ahead and have one item, one window, one
12:05 14 calendar tool like this in two different workspaces and
12:05 15 change the location of the workspace and have it go
12:05 16 ahead and record the same data; for instance, that
12:05 17 you're taking your son from school or to practice.

12:05 18 Go ahead and compare that. Compare that
12:05 19 versus what's shown in the patent. And you'll see
12:05 20 there's a one-to-one correlation with what Dr. Henderson
12:05 21 invented and what's called for in the claims of the
12:05 22 patent.

12:06 23 At the end, when you go ahead and look at
12:06 24 all the evidence, all the notes -- because I've seen you
12:06 25 taking a lot of notes -- there's that balancing process.

12:06 1 Slide 51.

12:06 2 Consider their arguments, consider their
12:06 3 evidence. I'm not saying don't do it. What does it
12:06 4 boil down to?

12:06 5 They say no displays. They say no
12:06 6 flexibility. They say no continuity.

12:06 7 What's the evidence that goes ahead and
12:06 8 supports that there is infringement?

12:06 9 We know that openSUSE and Fedora is used
12:06 10 on desktops. You heard testimony from Mr. Gray that the
12:06 11 only example he could ever name where something was --
12:06 12 where something in Fedora was used on a server -- in
12:06 13 other words, something related to their no display
12:06 14 argument -- that that was an experiment that he
12:06 15 conducted at home.

12:06 16 Those are not products which are used with
12:06 17 servers. They're used with desktops.

12:07 18 You've seen the examples of customer use.
12:07 19 You've seen direct testimony from both Defendants. And
12:07 20 most important of all, you've seen the claim language,
12:07 21 and you've seen the Court's claim construction. You're
12:07 22 going to get to study it in more detail. And you see
12:07 23 how there is a disconnect, a fundamental difference
12:07 24 between the terms that they're relying upon to show that
12:07 25 they don't infringe versus what the actual boundaries of

12:07 1 what the property is.

12:07 2 As a result, you're going to see, at least
12:07 3 under the preponderance of the evidence standard, at
12:07 4 least under that 50-yard line plus just a touch, that
12:07 5 that evidentiary standard has been met by the
12:07 6 Plaintiffs, that there's infringement.

12:07 7 Now, that brings us to our second issue.

12:07 8 If you'd go to Slide 52, Inventorship.

12:07 9 Inventorship comes up just once, one
12:07 10 question. That's Question 17 on your verdict form. And
12:08 11 the issue in this case is one for which the Defendants
12:08 12 bear the burden of proof. They bear the burden of proof
12:08 13 by clear and convincing evidence, because it's presumed
12:08 14 that Xerox named the correct inventors when they filed
12:08 15 for their patent application.

12:08 16 Think about this for a second. If we had
12:08 17 gone ahead -- let's imagine some alternative universe
12:08 18 where you had filed the same invention with just one
12:08 19 inventor or just two inventors, all of them from the
12:08 20 same company; it's all Xerox PARC's property.

12:08 21 What do you think the Defendants would be
12:08 22 saying?

12:08 23 They'd saying you left an inventor out;
12:08 24 you screwed up.

12:08 25 The evidence is that all three of the

12:08 1 inventors came up with this invention. The evidence is
12:08 2 all three of the inventors talked to one another. And
12:08 3 the evidence is that they worked together.

12:08 4 You saw Mr. Maxwell talking about the
12:08 5 merging of the process, and you heard live from
12:09 6 Dr. Henderson -- by the way, nobody forced him to stay
12:09 7 down here the whole trial. He's still out there in the
12:09 8 gallery as a matter of fact, because it's his invention;
12:09 9 it's his baby. And he worked with the co-inventors.

12:09 10 There was a period of time of three months
12:09 11 where they talked to each other in the summer of '86;
12:09 12 then Dr. Henderson and Dr. Card further went ahead and
12:09 13 came up with additional features.

12:09 14 You remember the catalogue feature that
12:09 15 Dr. Henderson talked about, that was part of their Rooms
12:09 16 Project that they came up with in the fall of '86. They
12:09 17 added to that feature, after they had the benefit of
12:09 18 talking to Mr. Maxwell.

12:09 19 And then in the beginning of 1987, they
12:09 20 all worked together further adding features that were
12:09 21 beyond Rooms and Desk Tops, because remember these
12:09 22 patents are not limited just to Rooms and Desk Tops.
12:09 23 They're limited only by what's in the scope of the
12:09 24 claims.

12:09 25 The examples that are included in there

12:09 1 include Desk Tops and Rooms. But it's not just
12:09 2 something that's in one commercial product or another.
12:10 3 There's a lot more to it than what's set forth the
12:10 4 claims.

12:10 5 And as a result of a three-month period of
12:10 6 collaboration, they file the patent application that
12:10 7 resulted in three different patents: The '412 patent,
12:10 8 which was issued in 1991; the '521 patent, which issued
12:10 9 in 1995; and the '183 patent, which was issued in 1996.

12:10 10 You don't have to rely just on live
12:10 11 testimony either to support this Inventorship. Remember
12:10 12 the articles that Dr. Henderson talked about? July of
12:10 13 1986, we know that the inventive process had started
12:10 14 because Dr. Henderson and Dr. Card had created a paper
12:11 15 to go ahead and describe some of their ongoing work with
12:11 16 Rooms.

12:11 17 And in that paper, we know that they were
12:11 18 aware of Mr. Maxwell's work. They commented upon it.
12:11 19 They were continuing their work and commenting upon the
12:11 20 work of their co-inventor, Mr. Maxwell. They talked
12:11 21 about their discussions with Mr. Maxwell. They
12:11 22 acknowledged that they had talked with him in
12:11 23 discussions with the Cedar Windows Project.

12:11 24 Now, let's compare that with the jury
12:11 25 instructions. In the jury instructions, the Judge went

12:11 1 ahead and provided an example of what it means to be
12:11 2 joint inventors.

12:11 3 Can we you switch over to that briefly?

12:11 4 An example of that kind of effort is
12:12 5 collaboration or working under common direction, one
12:12 6 inventor seeing a relevant report and building upon it
12:12 7 or hearing another's suggestions at a meeting.

12:12 8 And that's exactly what happened back in
12:12 9 1986.

12:12 10 The third issue that you're going to have
12:12 11 to decide is the issue of validity. Anticipation. In
12:12 12 other words, is there one system that discloses each and
12:12 13 every element of a given claim.

12:12 14 And, again, remember this is something
12:12 15 that the Defendants bear the burden of proving. They
12:12 16 bear the burden of proving by a lot more than just this
12:12 17 51-percent standard that we have. They have to go ahead
12:12 18 and show clear and convincing evidence.

12:12 19 And the three references that they're
12:12 20 relying upon are the Amiga system, the Chan system or
12:12 21 the Chan rooms model, and the Apple Switcher. You've
12:13 22 heard testimony from their expert, Dr. Wilson, and
12:13 23 you've heard also testimony from Dr. Zimmerman
12:13 24 contradicting his conclusions.

12:13 25 You also need to consider, though, a

12:13 1 couple other sources. One person you didn't get to hear
12:13 2 from today about the relationship between things like
12:13 3 the Apple Switcher or the Chan rooms model is the Patent
12:13 4 Examiner.

12:13 5 We know that the Patent Examiner had the
12:13 6 Switcher in front of them. We know that the Patent
12:13 7 Office had the Chan rooms model in front of them. More
12:13 8 importantly, we know that there wasn't any issue about
12:13 9 confusion, because the inventors had gone ahead and
12:13 10 sifted through and explained each of those references to
12:13 11 the Patent Office.

12:13 12 For instance -- switch to Slide 74,
12:13 13 please.

12:13 14 You saw evidence earlier that there was
12:14 15 what's called an information disclosure statement.
12:14 16 There was a need for the inventors and for their
12:14 17 attorneys to be forthright, to go ahead and disclose
12:14 18 everything they know to the Patent Office.

12:14 19 They talked about the Macintosh Switcher.
12:14 20 The Macintosh Switcher was considered and became part of
12:14 21 the official record of the patent. The same thing with
12:14 22 respect to the Chan room model.

12:14 23 Now, there's a question at one point in
12:14 24 terms of distinctions between a workspace and an
12:14 25 application. And -- which the Court is going to provide

12:14 1 instructions on terms that were construed, but you'll
12:14 2 read from your instructions that where there's a lack of
12:14 3 a specific instruction from the Court, you're going to
12:14 4 go ahead and draw on your experiences.

12:14 5 I think the specific language is: For any
12:14 6 words in the claim for which I have not provided you
12:15 7 with a definition, you should apply the plain English
12:15 8 meaning.

12:15 9 Take a look at what's in these patents.
12:15 10 Look, for instance, at Figure 1.

12:15 11 Go to Slide 79, please.

12:15 12 There's a perfect example in there.
12:15 13 Workspaces and applications. A workspace is the whole
12:15 14 screen. The application is something that's as simple
12:15 15 as those boxes. And what did the patent call those
12:15 16 boxes?

12:15 17 If you go to the specification, you're
12:15 18 going to see they talk about them as display objects --
12:15 19 in this instance, they're called windows -- are provided
12:15 20 by the same display system object, which calls it a text
12:15 21 editing application. That's an application.

12:15 22 Now, you go ahead and compare that to the
12:15 23 Macintosh Switcher. What do they call that? They call
12:15 24 that --

12:15 25 Switch to 577, please. If you could focus

12:16 1 in on the text.

12:16 2 Remember looking at that in the
12:16 3 cross-examination of Dr. Wilson? They called that an
12:16 4 application switcher. It's not a workspace switcher;
12:16 5 it's an application switcher.

12:16 6 Let's talk about the Amiga reference. The
12:16 7 Amiga reference --

12:16 8 If you switch to Slide 81, please.

12:16 9 The Amiga reference, this is quoting from
12:16 10 the exhibit they're relying upon. It's a tool. Again,
12:16 11 a tool is like an application. It's not a workspace.
12:16 12 The words that were added by Dr. Wilson to try and show
12:16 13 that it was a workspace, that was added in. That was
12:16 14 his characterization, not what the evidence actually
12:17 15 showed, not what the prior art actually includes.

12:17 16 They haven't met their burden of proof.
12:17 17 They haven't shown a firm conviction that each and every
12:17 18 element of these claims is met.

12:17 19 Finally, let's go to the issue of damages.
12:17 20 The Defendants, I suspect, will spend a lot of time -- a
12:17 21 lot of your time over the hour-plus focusing on
12:17 22 something that is frankly not an issue. They're going
12:17 23 to go ahead and focus as part of the apparent merits of
12:17 24 the case about how Mr. Cooper, Technology Licensing
12:17 25 Corporation's representative, is a bad guy.

12:17 1 They lied; that the Judge called them on
12:17 2 that lie; and that as a result, some of his patents were
12:17 3 taken away. Again, when you start hearing comments like
12:17 4 this, you've got to ask yourself, what does this have to
12:18 5 do with infringement?

12:18 6 What does this have to do with
12:18 7 Inventorship?

12:18 8 What does this have to do with validity?
12:18 9 Did Mr. Cooper testify about any of these
12:18 10 things?

12:18 11 No, no, no.

12:18 12 The one issue that Mr. Cooper testified
12:18 13 about, besides the ownership of the patents, which is
12:18 14 not something that we're discussing here today -- it's
12:18 15 not an issue that you have to decide who owns the
12:18 16 patents -- is the negotiations that he conducted with
12:18 17 Apple.

12:18 18 Remember, the one license that TLC and IP
12:18 19 Innovation got in 2007 was with Apple. In June of 2007,
12:18 20 they settled an ongoing lawsuit, very shortly after the
12:18 21 lawsuit was file. They settled it for \$1.25 million.

12:18 22 Mr. Cooper's testimony was that they were
12:18 23 sued on Tiger software, which we know is true, because
12:18 24 that's what's in the complaint. And that one of the
12:18 25 things that influenced why IP Innovation and TLC took a

12:18 1 license for as low a figure as they did was because of
12:19 2 the delay with the Leopard software, the upcoming
12:19 3 Leopard software product.

12:19 4 You know what, whether Mr. Cooper -- even
12:19 5 if he hadn't told the truth on that, even if you didn't
12:19 6 believe him, the evidence shows that Apple did come out
12:19 7 with the Leopard product four months after this feature.
12:19 8 In other words, that Apple added the concept of virtual
12:19 9 workspaces with the launch of Leopard in October of
12:19 10 2007. In other words, they added to the concept
12:19 11 something that didn't exist before in October of 2007.

12:19 12 This issue of going and looking at prior
12:19 13 use, prior use of the workspace switcher feature is
12:19 14 completely unsupported by the evidence. The Defendants
12:19 15 haven't shown that there was any prior use by Apple of
12:19 16 the workspace switcher.

12:19 17 And the evidence does show that workspace
12:19 18 switcher came online with Apple in their Leopard product
12:20 19 in October 2007, which is exactly the same timeframe of
12:20 20 the infringement that is the subject of this case here
12:20 21 today.

12:20 22 Now, there is one point I should bring --
12:20 23 that we do agree on one thing with Dr. Putnam.
12:20 24 Dr. Putnam recognized that when it comes to damages, you
12:20 25 have to adjust for risk, when it comes to settlements.

12:20 1 Settlements recognize that you could lose,
12:20 2 so you're going to settle for less than what you would
12:20 3 if you have to go in front of a jury like today. Early
12:20 4 on, when there were all sorts of risks against Apple,
12:20 5 TLC and IP Innovation decided to go ahead and take a
12:20 6 license for \$1.25 million.

12:20 7 Now, there are four licenses that are
12:20 8 involved in this lawsuit: Silicon Graphics, Central
12:20 9 Point Data, Hewlett-Packard, and Apple. Three of the
12:20 10 four licenses were done by Xerox 15 years ago.

12:21 11 Dr. Putnam is relying upon a lump-sum
12:21 12 license for \$95,000. What do we know about that?

12:21 13 We know that Silicon Graphics offered to
12:21 14 go ahead and take the feature out of their product. And
12:21 15 we know that back then, when that license was done in
12:21 16 1994, two of the three patents that we're talking about
12:21 17 today weren't even issued. There weren't even property
12:21 18 rights on the '521 and '183 patents. There was only one
12:21 19 issued patent as of that date.

12:21 20 The important thing is, is that we have no
12:21 21 idea of the use. Everybody admits we have no idea how
12:21 22 much the Silicon Graphics agreement was used. All we
12:21 23 know is the lump sum that was paid. We know the lump
12:21 24 sum that was paid, 95,000 back then, and we know the
12:21 25 lump sum that was paid by Apple, \$1.25 million, last

12:21 1 year -- excuse me -- three years ago.

12:21 2 Which one do you think the Defendants want
12:21 3 you to rely upon?

12:21 4 We think a much more fair metric is how
12:21 5 much use there is, how many copies were downloaded.

12:22 6 Now, there's been a lot of testimony about
12:22 7 use and how IP addresses don't relate to the number of
12:22 8 users. Again, let's look at the evidence, the
12:22 9 statements that Red Hat's employees have made to the
12:22 10 public about the number of users.

12:22 11 Can you put on 283, Slide 91?

12:22 12 What they're telling the public -- in
12:22 13 other words, what they're not saying in the courtroom
12:22 14 here is there is accuracy in metrics. In other words,
12:22 15 that the number of units in the field are higher than
12:22 16 the number of units that are shown on that page.

12:22 17 In other words, that for Mr. Gemini to
12:22 18 rely upon those figures, those totals, is a low -- is
12:22 19 actually lower than the actual number of units in the
12:22 20 field.

12:22 21 We also know that the same gentleman that
12:22 22 went ahead and created this entry went ahead and told
12:23 23 the public that the number of users was 9.5 million
12:23 24 users of the Fedora 7, 8, and 9, and another 2.5 million
12:23 25 users of the proprietary RHEL product.

12:23 1 Now, the other key point that you need to
12:23 2 consider is the disconnect between what the Defendants
12:23 3 did with their infringing software once they were sued
12:23 4 versus what Silicon Graphics did when Xerox came
12:23 5 knocking on their door.

12:23 6 Silicon Graphics said, you know what, we
12:23 7 don't need this feature. We're willing to take it out.

12:23 8 You also heard testimony from Mr. Riveros
12:23 9 yesterday. He was asked the following question. He was
12:23 10 asked whether or not there was any way to eliminate this
12:23 11 feature or disable it. He said it could be done; it was
12:24 12 possible, but it's not something we would do, because,
12:24 13 first of all, it's a huge hassle. We would basically
12:24 14 have to redo the whole package.

12:24 15 You need to consider at the end of the day
12:24 16 that there's a choice -- there is a result of that
12:24 17 choice. There is a result of their conduct in choosing
12:24 18 not to eliminate the infringing feature, to take a
12:24 19 different path from what Silicon Graphics did.

12:24 20 Whether you go ahead and reach a damages
12:24 21 figure using a reasonable royalty based upon a number of
12:24 22 units or a lump-sum figure, I think at the end of the
12:24 23 day, when you consider the evidence that's applicable, I
12:24 24 think you end up in the same damage figure.

12:24 25 We think you should go ahead and use the

12:24 1 degree of use, because we think that's a more accurate
12:24 2 metric than simply a lump sum. But that's your choice.

12:24 3 In the end, your choices are to go ahead
12:24 4 and consider infringement, consider the value of the
12:24 5 invention of my clients' property, and consider that
12:24 6 they've taken it, and they haven't paid for it.

12:25 7 Thank you.

12:25 8 And I apologize. I went five minutes
12:25 9 over, I'm told by co-counsel, so I did 45 minutes
12:25 10 instead of 40, but part of that was just getting set up
12:25 11 here.

12:25 12 So thank you for your time.

12:25 13 THE COURT: Let's take a
12:25 14 five-to-ten-minute break, and then we'll come back in
12:25 15 here with the Defendant.

12:25 16 (Recess.)

12:25 17 (Jury in.)

18 THE COURT: Please be seated.

12:40 19 Mr. Krevitt.

12:40 20 MR. KREVITT: Thank you, Your Honor.

12:41 21 Ladies and gentlemen of the jury, Josh
12:41 22 Krevitt. I'm going to now speak to you about Red Hat
12:41 23 and Novell.

12:41 24 I do want to say at the outset, though,
12:41 25 that I had had no intention at all of bringing up the

12:41 1 fact Mr. Cooper testified that he had lied to the patent
12:41 2 office and lied to the Court, and that before I even got
12:41 3 a question in on cross-examination, it was necessary for
12:41 4 Judge Rader to give a special instruction that some of
12:41 5 his testimony was not accurate.

12:41 6 My -- I'm very confident and comfortable
12:41 7 with your all (sic) recollection with what happened with
12:41 8 Mr. Cooper's testimony.

12:41 9 I want to focus on the substance, and Mr.
12:41 10 Gasey's remarks, to my mind, capture all that's wrong
12:41 11 with this case, all that's wrong with the Plaintiffs'
12:41 12 presentation.

12:41 13 You saw a lot of scales, you saw some
12:41 14 magnifying glasses, and you saw an awful lot of checks.
12:41 15 But what you didn't see is substance. That's what we
12:41 16 want to focus on, the substance.

12:41 17 The very first words that Mr. Gasey said
12:42 18 after, good morning, the very first words were, this is
12:42 19 a clash, a fundamental clash between the open-source
12:42 20 community on the one hand and patent owners on the other
12:42 21 hand. This is a fundamental clash of policy
12:42 22 considerations.

12:42 23 That's not how we see the case. My
12:42 24 clients have been sued, and they're asking for millions
12:42 25 of dollars, and there's no merit at all to the case, and

12:42 1 there never has been, not since they wrote the letter
12:42 2 saying that they wanted us to take 20 days to look at
12:42 3 the issues, not since they told us to do our own
12:42 4 evaluation, not since they said, we don't want a
12:42 5 lawsuit, and went ahead and filed the lawsuit the very
12:42 6 next day.

12:42 7 There's no merit to the lawsuit, and I'm
12:42 8 going to walk you through that, and I think it will be
12:42 9 clear. It's not our burden. You've seen a lot about
12:42 10 scales. The Plaintiffs like to talk about scales, and
12:42 11 you know it's not our burden to prove noninfringement.
12:42 12 We don't have to do anything. But the Plaintiffs do.

12:42 13 The Plaintiffs talk a lot about football
12:42 14 lines. And we just have to -- I think Mr. Gasey put it,
12:42 15 50 percent plus a tiny little bit, because they want --
12:43 16 they want -- they want to lower what they need to show
12:43 17 to prove infringement because they can't prove
12:43 18 infringement.

12:43 19 It's their burden. They have to come
12:43 20 forward. And it's true, you can think about it as
12:43 21 scales, but when they put nothing at all in front of the
12:43 22 scales, they don't win, they haven't met their burden.
12:43 23 Putting checkmarks in a scale is not proving your
12:43 24 burden. Putting a magnifying glass up on a screen, it's
12:43 25 just not meeting your burden.

12:43 1 Looking at the claims, looking at the
12:43 2 language, our products, that's meeting your burden, and
12:43 3 that hasn't happened in this case, and we're going to
12:43 4 talk about it.

12:43 5 I just -- I want to say at the outset,
12:43 6 though, about how we got here and what we think this
12:43 7 case is about. What we think this case is about and
12:43 8 what the evidence has already shown and what I hope is
12:43 9 clear to you-all is that IPI and TLC were given patents
12:43 10 by Xerox. Those companies exist, this is in the record,
12:43 11 to get money for patents they acquire by suing folks.

12:43 12 So IPI and TLC went ahead and sued some
12:44 13 people, and as part of that settlement, they were given
12:44 14 these patents.

12:44 15 You remember during Mr. Cooper's testimony
12:44 16 he said several times, and Mr. Gasey kept using this
12:44 17 language, that they bought the patents, IPI and TLC
12:44 18 bought the patents. Remember that? They didn't buy the
12:44 19 patents. They didn't pay any money for the patents.
12:44 20 They brought a lawsuit, and as part of that settlement,
12:44 21 they were given the patents.

12:44 22 Remember I showed you the agreement, and
12:44 23 Mr. Gasey objected to you seeing the agreement. I
12:44 24 showed the agreement in which Xerox gave the patents
12:44 25 away. How do you have a case where you represent to the

12:44 1 jury that somebody bought patents without showing the
12:44 2 agreement that gave them the patents in the first place?
12:44 3 That's the Plaintiffs' case.

12:44 4 Because what happened here is IPI and TLC,
12:44 5 when they sue people, they expect them to roll over, to
12:44 6 pay some money, to go away. That's the game plan.
12:44 7 That's the program.

12:44 8 Remember Mr. Cooper testified about the
12:45 9 TLC licensing programs for these patents? It was -- it
12:45 10 was a question I asked him. He said first thing we did
12:45 11 is we had a licensing program when we got the patents.
12:45 12 We -- we developed a licensing program.

12:45 13 The licensing program was suing three
12:45 14 companies, waiting three years, and filing three
12:45 15 lawsuits. Welcome to the TLC licensing program.
12:45 16 You-all are a part of it. That's what's going on here.

12:45 17 And why didn't my clients roll over? Why
12:45 18 is it Michael Tiemann from a Red Hat has been here all
12:45 19 week and Markus Rex from Novell and Justin Steinman with
12:45 20 premature twins flying down? Why didn't we?

12:45 21 Mr. Vickrey asked Dr. Putnam today, how
12:45 22 can it be that your clients, that your clients would
12:45 23 pursue this case when they're paying you more money than
12:45 24 it would cost to make us go away, just to pay us off?
12:45 25 How could that possibly be? Because it's wrong.

12:45 1 When somebody sues you and there's no
12:45 2 basis to the lawsuit at all, it's wrong. You don't pay
12:45 3 to make them go away, because what you don't want to
12:46 4 fuel, you don't want to fund that litigation machine.
12:46 5 It's going to steamroll over someone else and it's going
12:46 6 to steamroll over you another time. It's wrong.

12:46 7 So what did my clients do? They said, no,
12:46 8 we're not going to pay to make IPI and TLC go away. No,
12:46 9 we're not. We're not going to give them money just
12:46 10 because it would be easier. We are going to take this
12:46 11 case and we are going to submit this case to 11,
12:46 12 originally 12, 11 strangers in Marshall, Texas. That's
12:46 13 how comfortable we are in the merits. That's how
12:46 14 comfortable we are that when the evidence comes out, the
12:46 15 jury will agree with us.

12:46 16 And one thing I can assure you right from
12:46 17 the start every day in every way, we tried to make this
12:46 18 clear for you-all. And I'm certain we didn't always
12:46 19 succeed, but that was our goal. Every single day when
12:46 20 we went to bed, how can we make this clear for the jury?
12:46 21 How can we explain this evidence? How can they
12:46 22 understand what the patent means? Because when you do,
12:46 23 as I said at the outset, when you understand what the
12:47 24 patents actually cover and what our products actually
12:47 25 do, we don't infringe.

12:47 1 So very quickly, let's talk about what
12:47 2 evidence the Plaintiffs put on about our products. Did
12:47 3 you see a demo of our products? You heard a lot of
12:47 4 testimony that you could download it for free. You can
12:47 5 go on the lunch break and download it -- not until
12:47 6 you're done with your deliberations. But after, you can
12:47 7 go and download it for free. It's available.

12:47 8 They had no problem showing you Microsoft
12:47 9 Windows the other day when Mr. Hill was cross examining
12:47 10 Dr. Wilson. I think that was yesterday. It seems like
12:47 11 forever ago. They had no problem doing a demonstration.

12:47 12 Isn't it strange to you that somebody
12:47 13 would accuse somebody of infringement and ask you-all to
12:47 14 award millions of dollars and not show the product?
12:47 15 Doesn't that seem a little weird to you? The reason
12:47 16 they didn't show the product is because we don't
12:47 17 infringe.

12:47 18 What else did they do? At the outset, I
12:47 19 explained to you that what the patent was about is
12:47 20 flexibility and continuity. Remember that? Flexibility
12:47 21 and continuity. And I explained why. I didn't ask you
12:48 22 to take my word for it. I walked through the figures,
12:48 23 right, and Mr. Gray did the same thing, and Dr. Wilson
12:48 24 did the same thing.

12:48 25 And so what is the response you've heard.

12:48 1 The Plaintiffs know that our products can't do
12:48 2 flexibility and continuity. They know that. No dispute
12:48 3 about that. Mr. Gasey didn't tell you otherwise. Our
12:48 4 products can't do it. So what do they do? They've got
12:48 5 to get rid of that. Flexibility and continuity won't
12:48 6 work. They've got to get rid of that.

12:48 7 So the way they do that is slight of hand.
12:48 8 They tell you, are those words in the claims? Are those
12:48 9 exact words in the claims? That's what they do. Even
12:48 10 though Dr. Henderson, the inventor of the patents who
12:48 11 came here and testified, who is still here, as Mr. Gasey
12:48 12 pointed out, testified using exactly those words. So
12:48 13 Dr. -- it's good enough for Dr. Henderson to understand
12:48 14 his own invention, it's good enough for
12:48 15 Dr. Henderson to explain it to the jury. But when
12:48 16 you-all go back to the jury room and you try to sort
12:49 17 this out, the only words you can use, and I challenge
12:49 18 you to do this for three minutes, the only words you can
12:49 19 use are the words in the claims.

12:49 20 I want you to have a conversation about
12:49 21 display system objects and display objects and whether
12:49 22 or not data structures are common. It's -- the reason
12:49 23 people use words is the same reason Judge Rader, the
12:49 24 Court, construes the claims. It's so that people in
12:49 25 your position can understand what the claims mean. It's

12:49 1 about clarity.

12:49 2 We are the party of clarity. We are the
12:49 3 party that wants you to understand. We want to make it
12:49 4 clear because clarity is our friend. We win with
12:49 5 clarity. The Plaintiffs are the party of confusion, of
12:49 6 distraction.

12:49 7 So even though Mr. Henderson --
12:49 8 Dr. Henderson, excuse me, used exactly those words, they
12:49 9 were good enough for him, they're not good enough for
12:49 10 you. But here's an interesting thing, not a single
12:49 11 witness that testified over four days, not one said that
12:49 12 flexibility and continuity does not accurately describe
12:49 13 the patents. Think about that.

12:50 14 Dr. Zimmerman was here, the Plaintiffs'
12:50 15 expert. He was asked one question about this. One
12:50 16 question, the very first question of his examination.
12:50 17 Is that accessible? No. Take my work for it, the one
12:50 18 question he was asked is the one question you were told.
12:50 19 Are those words -- and you hear -- you heard the
12:50 20 Defendants' lawyer, right out of the box, Mr. Krevitt,
12:50 21 talk about flexibility and continuity, correct? Yes, I
12:50 22 did. Are those words anywhere in the claims of
12:50 23 Dr. Henderson's patents? No, they not.

12:50 24 Well, he needn't have asked that question.
12:50 25 We know that. But did he ask the next question? Are

12:50 1 they inaccurate? In any way, do you disagree with that
12:50 2 characterization? It's his own expert. Do you think
12:50 3 that's not an appropriate way to characterize the
12:50 4 patents? He didn't ask the question. He didn't ask the
12:50 5 question because we know the answer. Dr. Henderson gave
12:50 6 the answer. The answer is flexibility and continuity
12:50 7 are accurate.

12:50 8 Don't you ask your own expert, if the
12:50 9 answer is no, wouldn't that be helpful? Wouldn't it be
12:51 10 nice for Mr. Gasey to have been able to stand up here
12:51 11 and say, and as Dr. Zimmerman said, flexibility and
12:51 12 continuity is inaccurate.

12:51 13 You don't ask a question -- this is basic
12:51 14 101 stuff, when you know the answer is a bad one. So he
12:51 15 didn't ask Dr. Zimmerman.

12:51 16 Dr. Wilson testified that flexibility and
12:51 17 continuity accurately describes the patents.
12:51 18 Dr. Gray testified to flexibility and continuity
12:51 19 accurately describes the patents. Dr. Henderson
12:51 20 described that flexibility and continuity accurately
12:51 21 described the patents. And Dr. Zimmerman said, the
12:51 22 words aren't in the claims. That's all you got. Every
12:51 23 witness consistent, flexibility and continuity.

12:51 24 But I want you to understand something
12:51 25 else. That's not the reason that we're saying we don't

12:51 1 infringe, meaning we're not -- it's not that we are not
12:51 2 relying on the claim language. I want you to understand
12:51 3 that. We are relying on the claim language. So I will
12:51 4 walk you through a claim. I will do, with respect to
12:52 5 infringement, what the Plaintiffs didn't. And I will
12:52 6 explain to you where those concepts come from and why it
12:52 7 is that we do not have those in our product.

12:52 8 So Claim 1 says: A first display object
12:52 9 and a second display object. Do you see those? And it
12:52 10 goes on to require that those are in different sets of
12:52 11 workspaces, that the first display object, A, B, C, D
12:52 12 can be located one place and the second display object
12:52 13 in a different place. And you've seen this figure an
12:52 14 awful lot, right? And you see right out of the
12:52 15 specification that they can be presented in different
12:52 16 locations on the screen and with different dimensions.
12:52 17 That's the flexibility. That's all we're talking about.

12:52 18 But when you're in the jury room, focus on
12:52 19 the claim language. We're not telling you flexibility
12:52 20 is in the claim. We could have eliminated that
12:52 21 confusion a long time ago. That word is not in the
12:52 22 claim. That concept is required by the claims. Dr.
12:52 23 Henderson told you that.

12:52 24 Now, let's move on, and we look at
12:52 25 continuity. The claims require that they be perceived

12:53 1 the same, that you can continue your work. You look
12:53 2 right in the specification. It maintains continuity.
12:53 3 Next line in the specification. You continue your
12:53 4 working. You perceive these things as the same tool so
12:53 5 you can continue your work. That was the invention.
12:53 6 The title of the invention is shared display objects,
12:53 7 display system objects. Excuse me.

12:53 8 What that means is you have two display
12:53 9 objects in two workspaces. But so that you can have the
12:53 10 flexibility to arrange them any way you want and the
12:53 11 continuity to continue your work, they share the same
12:53 12 data structure. They share -- they come from the same
12:53 13 place. That's the title of the patent. They share a
12:53 14 system object. And by sharing the system object, what
12:53 15 that means is, but not being the same, it means they can
12:53 16 be arranged differently. That's the flexibility right
12:53 17 out of the claims in terms of talking about the first
12:53 18 display object and the second and different sets, and
12:53 19 also you can continue your work.

12:53 20 Dr. Henderson told you that, you heard
12:54 21 deposition testimony from other inventors to that
12:54 22 effect, and it's right out of the claim language. So I
12:54 23 want to make sure you understand that this is a red
12:54 24 herring that flexibility and continuity are not in the
12:54 25 claims.

12:54 1 Now, let's move on and talk about
12:54 2 infringement quickly. The first thing I want to talk
12:54 3 about is direct infringement. These are concepts that
12:54 4 are not concepts with which you deal with every day, I
12:54 5 assume, and they are -- they are tough concepts for us
12:54 6 to keep straight. So I want to make sure you understand
12:54 7 that there are two theories on which the Plaintiffs are
12:54 8 seeking damages under infringement.

12:54 9 The first is what's called direct
12:54 10 infringement. What that means is that we infringe,
12:54 11 meaning Red Hat and Novell do all the things in the
12:54 12 claim. One actor, Red Hat, or one actor, Novell, does
12:54 13 all the things in the claim. All the claims require a
12:54 14 display. Remember that? So the only way we can be a
12:54 15 direct infringer -- there is no dispute on this
12:54 16 question -- the only way we can be a direct infringer is
12:55 17 for our internal use. Direct infringement is just when
12:55 18 -- when Michael Tiemann at Red Hat or Markus Rex at
12:55 19 Novell are using the computers themselves, when Red Hat
12:55 20 and Novell are using the computers themselves. That's
12:55 21 very important. That's direct infringement.

12:55 22 And the reason it's important is it's
12:55 23 another red herring. The Plaintiffs don't want you to
12:55 24 find direct infringement, or stated differently, they
12:55 25 don't care about that. Red Hat has some 3,200

12:55 1 employees. I think Novell has 3,900 worldwide. Let's
12:55 2 round both up to 4,000. They have 4,000 employees.

12:55 3 They're asking for 62 cents a copy.

12:55 4 That's \$2,400. If you find direct infringement because
12:55 5 the only direct infringement can be the use by my
12:55 6 clients, the use of the employees of my clients, direct
12:55 7 infringement results in damages of 24, 25, 2,000,
12:55 8 hundred dollars. I want to make sure that's clear.
12:55 9 That's direct infringement. Use by my clients
12:56 10 internally.

12:56 11 So what's inducement? That's what the
12:56 12 case is about. Inducement is that my clients sell
12:56 13 software, and it causes other people to infringe. It
12:56 14 causes you to infringe or some company to infringe.
12:56 15 That's inducement. It induces, it causes you to
12:56 16 infringe.

12:56 17 Now, here is the important thing. There
12:56 18 is no evidence, no evidence in this record -- and I
12:56 19 welcome Mr. Hill on his rebuttal to point to a single
12:56 20 shred of evidence on the following point. That even a
12:56 21 single customer, even one, has ever used the server
12:56 22 software with a display running Linux, running Red Hat
12:56 23 software, or running Novell software.

12:56 24 So let me make sure you understand what
12:56 25 I'm saying because it's very important.

12:56 1 They can only prove inducement -- can we
12:56 2 pull up the jury instructions on inducement? They can
12:57 3 only prove inducement, this is what Judge Rader told
12:57 4 you, they can only prove inducement if they have these
12:57 5 five things.

12:57 6 So the first is Defendants took actions
12:57 7 that caused somebody to infringe. Let's leave that
12:57 8 aside. Let's give them the benefit of the doubt on that
12:57 9 one. We think they're wrong, but for the moment we'll
12:57 10 give them the benefit of the doubt. By providing
12:57 11 software or Mr. Gasey talked about literature, we're
12:57 12 causing people to do -- to use our software. Let's
12:57 13 leave that one aside.

12:57 14 The next is that they encouraged acts, so
12:57 15 what that means is our customers' use, we're encouraging
12:57 16 our customers to do something, our customers' use
12:57 17 infringes.

12:57 18 Now, we proved, I hope, even though it's
12:57 19 not our burden, that nobody infringes. That's the
12:57 20 flexibility and continuity we talked about, that nobody
12:57 21 infringes. Hopefully we proved that. But even if you
12:57 22 accept the encouraged acts constituted direct
12:57 23 infringement -- let's move to the next thing --
12:57 24 Defendants were aware of the patent and knew or should
12:57 25 have known that the acts constitute infringement.

12:58 1 Let's make sure we understand what that
12:58 2 means. You cannot find inducement unless you find that
12:58 3 we knew there was infringement, unless you find that my
12:58 4 clients not only caused the customer to use the
12:58 5 software, but knew that when the customer used the
12:58 6 software, it would be infringing.

12:58 7 So if my clients believed that there was
12:58 8 no infringement, if my clients believed genuinely that
12:58 9 the software does not infringe, you cannot find
12:58 10 inducement. That's what this means. You must find, to
12:58 11 find inducement, the Plaintiffs must prove that my
12:58 12 clients knew that the acts of our customers would
12:58 13 infringe.

12:58 14 Michael Tiemann testified unequivocally,
12:58 15 Red Hat does not believe there's infringement. Red Hat
12:58 16 does not believe there's infringement. He had an
12:58 17 opportunity -- he was cross examined very aggressively
12:59 18 and ably by Mr. Hill, nothing on this question.

12:59 19 Markus Rex, same thing, does Novell
12:59 20 infringe? No, we don't. Has it been Novell's belief
12:59 21 that it doesn't infringe throughout this case? Yes, it
12:59 22 has been.

12:59 23 If they -- if you believe their testimony,
12:59 24 if you do not believe that Markus Rex and Michael
12:59 25 Tiemann lied when they testified under oath, there can

12:59 1 be no inducement under the instructions that Judge Rader
12:59 2 gave you.

12:59 3 There's another reason there can be no
12:59 4 inducements, and I'm sorry for spending so much time,
12:59 5 but this is the substance that I was talking about.
12:59 6 This is what you have to look at.

12:59 7 The other reason there can be no
12:59 8 inducement is this: The Plaintiffs must prove that
12:59 9 somebody actually did it, that somebody used our server
12:59 10 software with a display running our software. The
12:59 11 Plaintiffs must prove that someone did it.

12:59 12 It's not enough for Mr. Gasey to say --
12:59 13 and I wrote it down -- it's not enough for Mr. Gasey to
01:00 14 say: Who do you think put the material on the servers?
01:00 15 I don't know who put the materials on the servers.
01:00 16 They're suing my clients for millions of dollars. Who
01:00 17 do you think put the materials on the servers isn't good
01:00 18 enough. They need evidence. They need evidence that
01:00 19 somebody did it.

01:00 20 Mr. Hill will not be able to stand up here
01:00 21 and identify a single customer for which there is
01:00 22 evidence in the record that uses either of my clients'
01:00 23 server software with a display that runs Red Hat or
01:00 24 Novell's software. If he does, it will be the first
01:00 25 time we hear it. There is no evidence in the record of

01:00 1 somebody doing that.

01:00 2 It may seem like a technicality. He's
01:00 3 going to stand up and talk about all our customers.
01:00 4 Mr. Krevitt bragged time and again. We do. We have
01:00 5 lots of customers, lots of customers, the White House,
01:00 6 Department of Defense, Justice Department, NASA, lots of
01:00 7 big companies, too. That's not enough.

01:01 8 The Plaintiffs had the burden to come
01:01 9 forward with evidence that somebody did it. And they
01:01 10 had to come forward with the evidence of who did it and
01:01 11 prove that to you. And that -- the record is completely
01:01 12 absent of any such evidence. The issue was simply not
01:01 13 addressed at any time in this case.

01:01 14 So now let's talk about the two examples
01:01 15 that Dr. Zimmerman gave for infringement. He gave one
01:01 16 example of a trash icon, I believe, and one example of
01:01 17 the calendar. I want to note something, for what it's
01:01 18 worth, Mr. Gasey said that Mr. -- that Dr. Zimmerman had
01:01 19 been shown something that wasn't right. I assume it was
01:01 20 not deliberate.

01:01 21 The demonstrative that Mr. Gasey put on
01:01 22 the screen was used to cross-examine Mr. Gray.
01:01 23 Dr. Zimmerman was never shown that demonstrative,
01:01 24 because had Dr. Zimmerman been shown that demonstrative,
01:02 25 Mr. Lyon would have cross-examined him and demonstrated

01:02 1 that his opinions were wrong. So the demonstrative --
01:02 2 demonstrate wasn't shown to Dr. Zimmerman. It was only
01:02 3 shown on cross-examination to our witness.

01:02 4 And a funny thing about that. You know
01:02 5 I'm being tag-teamed today by Mr. Hill and Mr. Gasey.
01:02 6 Mr. Hill is going to stand up and speak yet. And that's
01:02 7 how it works. The Plaintiffs go first. They get to put
01:02 8 on their evidence. We've got to sit there and wait, and
01:02 9 then we get to go. We put on our evidence. And then
01:02 10 the Plaintiffs get another shot. They get to come back
01:02 11 up and put on their evidence. And that's how it happens
01:02 12 at trial, too.

01:02 13 It didn't in this case, but that's how it
01:02 14 happens in trial, also. Keep this in mind.

01:02 15 Dr. Zimmerman, who's still here with us,
01:02 16 could have testified in response to Mr. Gray's testimony
01:02 17 and could have explained why that was wrong. He could
01:02 18 have testified in response to Dr. Wilson's
01:02 19 demonstrations and explained why those are wrong.

01:02 20 The Plaintiffs could have put him up
01:02 21 and -- asked Dr. Zimmerman, why was Dr. Wilson's
01:03 22 demonstrations wrong? What was wrong with those? Walk
01:03 23 us through that. Where did -- where did Dr. Wilson go
01:03 24 wrong? Why should the jury not believe their own eyes
01:03 25 when they watched the demonstration that proved that

01:03 1 these patents are invalid. But they didn't put him on,
01:03 2 and they didn't put him on for the same reason they
01:03 3 didn't ask him the question about flexibility and
01:03 4 continuity.

01:03 5 It's not helpful. You don't put a witness
01:03 6 on who's going to say things that aren't helpful.
01:03 7 Mr. Gemini, too -- keep this in mind. Mr. Gemini
01:03 8 testified, and then Dr. Putnam testified. One of the
01:03 9 things Mr. Gemini also testified is: I don't have all
01:03 10 the information I need. Mr. Tiemann has some of it.

01:03 11 So then Mr. Tiemann testified. Remember
01:03 12 that? And Mr. Gemini was here when that happened. And
01:03 13 then what happened? I haven't seen Mr. Gemini since. I
01:03 14 don't know if he left town or just left the courthouse.
01:03 15 He -- he has not been around since. He could have
01:03 16 testified in response to what Mr. Tiemann said at any
01:04 17 time. He could have testified in response to what
01:04 18 Dr. Putnam said at any time. They chose not to put him
01:04 19 on.

01:04 20 Now, the two issues that were raised
01:04 21 here -- I want to make sure you understand. There is a
01:04 22 trash icon -- there are two kinds of windows -- forgive
01:04 23 me, I know you've heard so much about this, but there
01:04 24 are sticky windows and there are ordinary windows. On
01:04 25 that, there's no question, two kinds of windows, sticky,

01:04 1 ordinary.

01:04 2 The sticky windows, which -- of which this
01:04 3 is one, are one single display object. That's claim
01:04 4 language. I didn't say flexibility. That's claim
01:04 5 language. There is only one display object. It's
01:04 6 slapped on. It doesn't move. You go from workspace to
01:04 7 workspace. It is the same display object. It doesn't
01:04 8 share a display on -- system object with another display
01:04 9 object. It doesn't do the things that the claims
01:04 10 require, the claims require. It also has no
01:04 11 flexibility. That doesn't infringe.

01:04 12 The only other example was this, the
01:05 13 calendar. Now, the way our calendars work, and
01:05 14 Mr. Gray explained this, and I know this is technical,
01:05 15 and I -- and I'm doing the Plaintiffs' job. They're the
01:05 16 ones that should be explaining why this falls in the
01:05 17 scope of the claims. So I'm up here trying to explain
01:05 18 to you why they can't do that.

01:05 19 The way our calendar works, as you see
01:05 20 here, is you have one system object or data structure.
01:05 21 That's what generates that calendar, that's what
01:05 22 generates it, and you have another. The patent should
01:05 23 have done this. The patents share this. That's what
01:05 24 the patent title is about, sharing a system object.

01:05 25 In the patents, this and that would be

01:05 1 one. And that's what I was trying to do with my hands
01:05 2 earlier. Those two connect up to two different display
01:05 3 objects, but they control two different display objects.
01:05 4 And that's why you have continuity, because when you
01:05 5 share the display object, the data that you do to this
01:05 6 display object goes down to the system object and is
01:06 7 reflected in the other display object. So
01:06 8 that -- that does not -- that's the title. Thank you.

01:06 9 User interface with multiple work --
01:06 10 workspaces for sharing displace system objects, for
01:06 11 sharing display system objects. And if you go back,
01:06 12 these are not shared. That's right out of the claim.
01:06 13 When you-all go back, you can look at the claims.
01:06 14 That's in the claims. That's claim language, and we
01:06 15 don't infringe.

01:06 16 So on infringement, here's what
01:06 17 Dr. Zimmerman did. Dr. Zimmerman testified.
01:06 18 Mr. Gibbons stood here and said: So, Dr. Zimmerman, I'm
01:06 19 going to read you a claim element. He read a claim
01:06 20 element, and he said, is that claim element met? Yep.

01:06 21 And then Mr. Gasey stood up, you remember
01:06 22 that, and he went over and he -- he checked some things
01:06 23 on the board, that was the infringement analysis.
01:06 24 That's not meeting your burden. That's not enough.
01:06 25 That's an empty scale. So when they tell you about the

01:06 1 tiny amount, that's not enough. We don't infringe, and
01:06 2 we have presented evidence to that effect.

01:07 3 And we just put up on the screen, because
01:07 4 everyone likes graphics, when you get to the jury
01:07 5 question. This is what I want you to keep in mind, this
01:07 6 is both direct infringement, of course, and inducement,
01:07 7 because both require infringement. We don't do the
01:07 8 second and the third claim elements for sticky windows,
01:07 9 and for ordinary windows, we also don't do the second
01:07 10 and third claim elements. We are missing those
01:07 11 elements.

01:07 12 And as you know, as you've heard many
01:07 13 times, you miss one element, there's no infringement.
01:07 14 You miss two, three, doesn't matter. There's no
01:07 15 infringement. We are missing many elements. The
01:07 16 Plaintiffs have not proven infringement, and while we
01:07 17 didn't have to, we have proven no infringement.

01:07 18 Now, let's talk quickly about validity.
01:07 19 The -- I want to do the Inventorship issue first. I'm
01:07 20 going to try to make this one quick, okay?

01:07 21 Okay. So the Inventorship issue. There's
01:08 22 three inventors. You-all have heard that. There's John
01:08 23 Maxwell, on the one hand, and there's Card and Henderson
01:08 24 on the other. Dr. Henderson, excuse me. There's Card
01:08 25 and Dr. Henderson on the other.

01:08 1 There is no question, no dispute in this
01:08 2 case that Maxwell worked on one project and Card and
01:08 3 Henderson worked on another. The only question is at
01:08 4 some point did they collaborate. There's no dispute,
01:08 5 you heard it from all the deposition testimony that was
01:08 6 read, Dr. Henderson was very candid about this, they
01:08 7 worked on different projects. You got Card and
01:08 8 Henderson on the one hand. You've got Maxwell on the
01:08 9 other hand.

01:08 10 And let's just look quickly -- we'll tick
01:08 11 through this quickly. What did Card say: What about
01:08 12 John Maxwell? Did you work with him at all, not
01:08 13 directly, indirectly? Well, it turned out he had a
01:08 14 somewhat similar idea. And his work was done
01:08 15 independent of what you and Dr. Henderson did? More or
01:08 16 less, yes.

01:08 17 And I think we have Maxwell who says: Did
01:08 18 you work with Mr. Henderson or Dr. Card in developing a
01:09 19 multiple workspace environment? Answer: No. Did you
01:09 20 work on Rooms at all? Answer: No. Did you -- do you
01:09 21 consider Rooms -- that was Dr. Henderson and card's
01:09 22 project -- do you consider Rooms and Desktops, that's
01:09 23 Maxwell's project -- to be the same thing? No. I mean,
01:09 24 they are completely invented and implemented completely
01:09 25 independently of each other.

01:09 1 Hard to imagine, more unequivocal
01:09 2 testimony. So they invent the ideas separately.

01:09 3 Now, here's what the jury instruction
01:09 4 says. Again, let's just look at it very quickly. The
01:09 5 jury instruction, first line out of the jury
01:09 6 instruction. A joint invention, that's what they have
01:09 7 to prove -- excuse me -- we have to prove there's not a
01:09 8 joint invention, but for the patent to be valid, you
01:09 9 need a joint invention.

01:09 10 A joint invention is the product of
01:09 11 collaboration of the inventive endeavors, the ideas, the
01:09 12 ideas behind the invention -- That's what you have to
01:09 13 collaborate on -- of two or more persons working toward
01:10 14 the same end and producing an invention by their
01:10 15 aggregate efforts. You're collaborating on the
01:10 16 inventive ideas of two or more persons to the same end.
01:10 17 That didn't happen here.

01:10 18 You saw the testimony of Card, and you saw
01:10 19 the testimony of Maxwell. Here's what
01:10 20 Dr. Henderson explained. Dr. Henderson candidly
01:10 21 admitted that he and Card worked on one project and
01:10 22 Maxwell worked on another project. And then at some
01:10 23 point, a patent attorney shows up. At some point, a
01:10 24 patent attorney gets involved. The patent attorney gets
01:10 25 involved when there's already been an invention. You

01:10 1 don't just have patent attorneys laying around waiting
01:10 2 for something to happen. You have an invention, and
01:10 3 Patent attorneys show up.

01:10 4 And they start talking about the patent
01:10 5 process. Not coming up with the invention. Patent
01:10 6 attorneys don't come up with inventions. They
01:10 7 memorialize those in a patent. And so the patent
01:10 8 attorney comes around, and Card and Henderson start
01:10 9 talking with him, and he starts thinking about doing a
01:10 10 patent and in his research at Xerox discovers the work
01:11 11 of Maxwell and decides, hey, that's similar. Let's pull
01:11 12 that together.

01:11 13 If you look at Maxwell, he says: How did
01:11 14 it come to being that you and Mr. Henderson and
01:11 15 Dr. Card were put together on this one patent. The
01:11 16 patent attorney, the very first three words in response
01:11 17 to that question prove it all. The patent attorney, Jim
01:11 18 Beran, came to my office, and he said, we found your
01:11 19 name on some software in the CSL system on a system
01:11 20 called Desk Tops. Did you write that software? And I
01:11 21 said, yes. And he said, we'd like to file a patent on
01:11 22 that. And I said, sounds good to me.

01:11 23 Then they come together, and they do a
01:11 24 patent. So inventing separately but patenting together
01:11 25 is not enough. That's not joint Inventorship. And if

01:11 1 you'll indulge me just for a minute because -- so I was
01:11 2 talking to my daughter, and I was thinking about how to
01:11 3 explain this. And here's the -- here's how it occurred
01:11 4 to me.

01:11 5 So in her class, she's in fourth grade,
01:11 6 Mrs. Smith brought them all together. They all came
01:12 7 together, and they wrote a story. And Ms. Smith said,
01:12 8 you'll come up with the characters, and you come up with
01:12 9 where it will be, and you come up with the story line,
01:12 10 and you can come up with some crime action fun stuff,
01:12 11 and we'll all sit around a table, and we'll all write a
01:12 12 story together. We'll all collaborate on a story.
01:12 13 We'll have one story that we all collaborate on. All 11
01:12 14 of you are going to work on a story.

01:12 15 So you sit around a table, and you work
01:12 16 together, and then Mrs. Smith slaps it together, and now
01:12 17 you've got Mrs. Smith's fourth grade story. It's one
01:12 18 story on which you collaborated.

01:12 19 The difference is what happened here.
01:12 20 What happened here is if Mrs. Smith had said, okay, you
01:12 21 go out and write a story, and you go out and write a
01:12 22 story, everyone go write out and write their own story.
01:12 23 Don't talk to each other and don't collaborate. You all
01:12 24 go out and write your own stories and come back in a
01:12 25 week with your stories. And what we'll do, it will be

01:12 1 really cool, we'll slap all those stories together, and
01:12 2 we'll call those Mrs. Smith's 11 different stories from
01:12 3 fourth grade, 2010.

01:12 4 That is not collaborating on the stories.
01:12 5 That is not collaborating on the inventive endeavors.
01:13 6 You have to prove that they collaborated on the
01:13 7 inventions, not the writing of a patent.

01:13 8 They didn't. The evidence is unequivocal.
01:13 9 The evidence is clear and convincing, and you should
01:13 10 find the patent invalid. There is not a joint
01:13 11 Inventorship.

01:13 12 So now we'll move on. Let's talk about
01:13 13 anticipation.

01:13 14 You saw Dr. Wilson demo those machines,
01:13 15 and he was very excited about those machines, very
01:13 16 excited about computers, loves his computers. And he
01:13 17 demoed the Apple machine, and he demoed the Amiga
01:13 18 machine, and you saw it with your own eyes.

01:13 19 Now, Mr. Gasey told you not to believe
01:13 20 those eyes, and Mr. Hill will probably echo that, but
01:13 21 you saw it with your own eyes. Those machines
01:13 22 invalidated every single thing that the patents do.

01:13 23 And Dr. Wilson didn't just say, take my
01:13 24 word for it. He didn't do a demo and talk fancy about
01:13 25 his son, Steve, and then sat down. Mark Lyon brought

01:14 1 him through every single claim element for each one of
01:14 2 those machines, every single claim element,
01:14 3 element-by-element-by-element, and they were satisfied.

01:14 4 And so what did you hear today? What is
01:14 5 the response? What's plaintiffs' response to all of Dr.
01:14 6 Wilson's evidence? Here it was. With respect to Chan,
01:14 7 the only thing Mr. Gasey said is that there was another
01:14 8 article before the patent office. Stipulated, no
01:14 9 argument. There was another article before the patent
01:14 10 office. That's true.

01:14 11 There was an article, however, that was
01:14 12 not before the patent office that provided critical
01:14 13 details about the Chan system that had it been before
01:14 14 the patent office, the patent would not have been
01:14 15 allowed. That's what Dr. Wilson testified. The patent
01:14 16 would not have been allowed.

01:14 17 The information in the second article was
01:14 18 so important, was so different and Dr. Wilson explained
01:14 19 why the patent would not have been allowed.

01:14 20 Now, Mr. Gasey told you, you don't have to
01:15 21 worry about the article, but Dr. Zimmerman didn't tell
01:15 22 you that. Dr. Zimmerman could have come and explain why
01:15 23 the second article was really nothing. It didn't add
01:15 24 much, not a big deal. That didn't happen. So we have
01:15 25 to take Mr. Gasey's word for it.

01:15 1 So you have Dr. Wilson telling you it's
01:15 2 critical, and you have Mr. Gasey telling you it's not a
01:15 3 big deal.

01:15 4 Next, let's look at -- and that's it on
01:15 5 that. That's it on Chan. No argument, no argument,
01:15 6 keep this in mind. This is very important, no argument
01:15 7 that the Chan system does not disclose every element.
01:15 8 No argument that the Chan system doesn't invalidate the
01:15 9 claims as a reference. The only argument is one paper
01:15 10 was already before the patent office so we should assume
01:15 11 the patent office knew about it, and then we shouldn't
01:15 12 worry about it. No harm, no foul.

01:15 13 The second reference, also not -- second
01:15 14 system, also not before the patent office, which we seem
01:15 15 to be having technical difficulties, was the Amiga
01:15 16 Workbench. The Amiga Workbench was also not shown to
01:16 17 the patent office. And Dr. Wilson testified at length,
01:16 18 showed the system, worked on the system and explained to
01:16 19 you on a claim-by-claim basis, Dr. Wilson did for
01:16 20 invalidity what Dr. Zimmerman did not do for
01:16 21 infringement.

01:16 22 Dr. Wilson did not just say, take my work
01:16 23 or word for it. I didn't go over to a whiteboard and
01:16 24 just do checks. Dr. Wilson walked through item-by-item,
01:16 25 element-by-element, system-by-system why they are

01:16 1 invalidated. The Amiga Workbench is an example.

01:16 2 The Apple Macintosh is another example.

01:16 3 And this -- the Apple Macintosh, to my mind, and

01:16 4 Mr. Gasey's presentation, with all due respect, is a

01:16 5 perfect example of the confusion, of the distraction, of

01:16 6 the red herrings, of the don't look over here when

01:16 7 Mr. Hill was cross examining Dr. Wilson and could ask

01:16 8 any questions at all, any questions at all, and devotes

01:16 9 a large portion of it to bullying the witness about his

01:17 10 hourly rate, about how many hours he spent on this.

01:17 11 You have Dr. Wilson, one of the leading

01:17 12 experts and professional computer programmers in the

01:17 13 world, been in the business for 45 years, he's on the

01:17 14 stand under oath and telling the Court -- telling the

01:17 15 jury that the patents are invalid, and you spend your

01:17 16 time bullying him about his hourly rate.

01:17 17 So what did Mr. Gasey just say about the

01:17 18 Apple Macintosh? Mr. Gasey -- go back, please.

01:17 19 Mr. Gasey said that the Apple Macintosh does not

01:17 20 invalidate -- and it was a big windup -- he said, you've

01:17 21 got to look at the words of the claim. You've got to

01:17 22 focus on the words of the claim. Remember he said that?

01:17 23 And then he said the Apple Macintosh uses applications,

01:17 24 and an application is not a workspace.

01:17 25 But here's the interesting thing, he said,

01:17 1 you've got to look at the words of the claim. That's
01:17 2 really important. Judge Rader is telling you what that
01:18 3 means. You've got to look at that. And then he put up
01:18 4 on a screen Figure 1A and 1B. There wasn't a word on
01:18 5 the screen. There were words, because the words of the
01:18 6 claim construction prove they're wrong. If you show the
01:18 7 words and let you-all look at them and understand the
01:18 8 issue, it's clear. The patents' invalid.

01:18 9 Let's look at the words. The issue is,
01:18 10 Mr. Gasey raised one issue with respect to this. No
01:18 11 question about all the other elements. He raised one
01:18 12 issue. An application is not a workspace. So let's
01:18 13 look at the words, on the left, is out of the Court's
01:18 14 claim construction.

01:18 15 As Judge Rader said, you have to accept
01:18 16 these. These words are gospel for purposes of
01:18 17 understanding what this claim means. So the first is
01:18 18 display object. And Dr. Wilson ran through all this, so
01:18 19 forgive me for being repetitive, but I want this to be
01:18 20 clear because there was no other response with respect
01:18 21 to this system.

01:18 22 A display object is just a display
01:19 23 feature. It's just something on the screen.
01:19 24 Dr. Wilson testified to that. That went un rebutted.
01:19 25 There is no dispute. Dr. Zimmerman never said a single

01:19 1 thing different than that. It is something on the
01:19 2 screen. So we look, we've got a lot of things on the
01:19 3 screen, a lot of display objects. So we can check that
01:19 4 off. We've got display objects.

01:19 5 Now, what is a workspace? A workspace is
01:19 6 a collection of display objects. This is the Court's
01:19 7 claim construction. This is not Josh Krevitt's
01:19 8 explanation, Mr. Gasey's explanation. This is the
01:19 9 Court's claim construction. You have display objects,
01:19 10 and you have a collection of them. You've got a
01:19 11 workspace. You've got to accept that.

01:19 12 Whatever preconceived notions Mr. Gasey
01:19 13 wants to create or sense that a workspace is different
01:19 14 than an application is irrelevant. The Court tells you
01:19 15 what a workspace is. Its' a collection of display
01:19 16 objects. Use your own eyes. Don't listen to me. Don't
01:19 17 listen to Mr. Gasey. Use your own eyes.

01:19 18 There are display objects on that screen,
01:19 19 and there is a collection of display objects on that
01:20 20 screen. We've circled a bunch of the different display
01:20 21 objects. When you've got a bunch, you've got a
01:20 22 collection, and when you've got a collection, you've got
01:20 23 a workspace, and when you've got a workspace, you've got
01:20 24 an invalidating piece of prior art. There is no other
01:20 25 response the Plaintiffs have offered on this piece of

01:20 1 prior art.

01:20 2 Now, that's anticipation. So you never
01:20 3 will never need to get to the issues of damages, so I'm
01:20 4 reluctant to even raise it. But since the Plaintiffs
01:20 5 raised it and Mr. Hill is likely to raise it, I'll raise
01:20 6 it briefly. I want it to be clear, though, this is a
01:20 7 waste of all of our time. You'll never -- you never
01:20 8 need to get to damages.

01:20 9 So what about damages? Speaking
01:20 10 seriously, our view on damages in this case is use your
01:20 11 common sense. Use your common sense. Dr. Putnam
01:20 12 testified he's got a Ph.D. from Yale and a master's from
01:20 13 Yale, too, maybe. He's got more degrees. And we joke
01:21 14 around with him that I have never seen a case in which a
01:21 15 Ph.D. from Yale was less necessary.

01:21 16 Use your common sense. You have patents
01:21 17 that were given from Xerox to the Plaintiffs. You have
01:21 18 patents that Xerox licensed. We don't have to guess
01:21 19 what the marketplace would value these patents. We
01:21 20 know. It's the same thing I said. How much would you
01:21 21 pay for a cup of coffee? If you knew somebody else paid
01:21 22 for a cup of coffee, You want to pay the same thing.
01:21 23 You want to -- want to pay the same thing to rent a car
01:21 24 for the same period of time. This is just common sense.
01:21 25 We all know this.

01:21 1 Actually, we don't all know this. You may
01:21 2 recall I asked Mr. Cooper if he and I went and bought a
01:21 3 cup of coffee at the same time and they charged him
01:21 4 more. Whether that would be unreasonable, and
01:21 5 Mr. Cooper said, well, that might be reasonable. And
01:21 6 then I said, what if they charged you 40 times more?
01:21 7 Neither one of us had ever been in the store, we order
01:21 8 the same coffee, same size, little milk, and they charge
01:22 9 you 40 times more? Would that be reasonable? And
01:22 10 Mr. Cooper said, yeah, I can see circumstances where
01:22 11 that would be reasonable.

01:22 12 It's not reasonable. Anyone who says it
01:22 13 is has a credibility problem. It's not reasonable.
01:22 14 That's what the plaintiffs are asking for here. They're
01:22 15 asking you to focus on IP addresses. And they're asking
01:22 16 you to mix and match from Fedora and RHEL, and we need
01:22 17 only look at the licenses. That's what we need to look
01:22 18 at. What did Xerox license these patents for?

01:22 19 To HP, \$110,000. There's been a lot of
01:22 20 confusion about HP because Mr. Gasey said in his
01:22 21 opening, you may recall, you will see, Mr. Gasey said,
01:22 22 you will see a license in this case for 99 cents a copy.
01:22 23 Do you remember that? I do. It surprised me. I wasn't
01:22 24 aware of that license.

01:22 25 It doesn't exist. There is no license in

01:22 1 this case for 99 cents a copy. He was talking about the
01:23 2 HP license. In the HP license, there was a payment of
01:23 3 \$110,000 that covered, by the way, approximately \$24
01:23 4 million in sales. 110,000. That's it. That's the HP
01:23 5 license.

01:23 6 Now, at some point, it's true if they hit
01:23 7 \$10 million, there was a kicker, and then you started
01:23 8 paying some money. Never hit the money, never hit the
01:23 9 10 million, excuse me. HP, you-all may be familiar with
01:23 10 HP. They are a very large company. Paid \$110,000 for a
01:23 11 license for 14 years for these patents.

01:23 12 Silicon Graphics, how much did Silicon
01:23 13 Graphics pay? They had a license for 13 years, totally
01:23 14 paid up all in, \$95,000, \$95,000. That's what they
01:23 15 paid. And the Plaintiffs' emphasize, they say all the
01:23 16 time -- it's one of those issues that's funny because I
01:23 17 think it cuts against them. They say all the time, the
01:23 18 Plaintiffs -- excuse me, Silicon Graphics would have
01:24 19 taken it out. They would have taken that out, and
01:24 20 that's relevant. Of course, that's relevant. That
01:24 21 tells you how valuable this is.

01:24 22 It's so not valuable that they would have
01:24 23 been prepared to take it out. And how much are they
01:24 24 willing to pay to have this feature? How much are they
01:24 25 will to pay to keep this feature in their product?

01:24 1 About a hundred grand. That's what we'll pay, not a
01:24 2 dime more. \$95,000, all in, up front.

01:24 3 Central Point, 14-year license, 14-year
01:24 4 license also. We have no evidence, nobody has come
01:24 5 forward with any evidence that a single penny was ever
01:24 6 paid on that license. Now, it did provide on the
01:24 7 license for a 25 cent price per unit. It did provide
01:24 8 for that. There is no evidence. Dr. Putnam told you
01:24 9 this. Mr. Gemini told you this. No evidence at all
01:24 10 that even a single dime was ever paid.

01:24 11 So what do you have? You have \$110,000
01:24 12 paid. You've got zeroish, I don't know what that is,
01:24 13 paid. And you've got 95,000 paid. That's it from
01:24 14 Xerox. Three licenses. They had the patents for 13
01:25 15 years, were out trying to get money for these patents,
01:25 16 and in 13 years got \$205,000, licensing each one for 14
01:25 17 years, or in the case of Silicon Graphics -- excuse me
01:25 18 for 13 years. And then there's one other license
01:25 19 you-all have heard about, the Apple license.

01:25 20 And there's been -- you've heard some
01:25 21 discussion about the Apple license and how you should
01:25 22 understand the Apple license. So let's keep -- let's
01:25 23 stick to the things we can all agree on. The Apple
01:25 24 license covered all of Apple's products, every single
01:25 25 product, from the Macintosh to the iPads to the iTouch

01:25 1 to the iPhone to iTunes to everything. Every one of
01:25 2 Apple's products was covered by this license.

01:25 3 Another thing, Apple is a very, very big
01:25 4 company. And with all due respect to my clients, they
01:25 5 are tiny when it comes to a comparison with Apple.
01:25 6 Another thing, and Judge Rader instructed you on this,
01:25 7 the Apple license covered a period of seven years,
01:26 8 covered a period of seven years. The damages period in
01:26 9 this case is 14 months. That's one-sixth -- one-sixth
01:26 10 of the time.

01:26 11 We just -- even if you ignore how big
01:26 12 Apple is, even if you ignore all of that, you're left
01:26 13 with give or take \$200,000 just if we were to look only
01:26 14 at the time.

01:26 15 And so what did we hear today? We heard
01:26 16 from Mr. Gasey that, well, you should ignore all the
01:26 17 parts before they sign the license because the older
01:26 18 version of the Apple didn't have this feature. Two
01:26 19 problems with that. One, false. The feature that the
01:26 20 Apple product had was the same as the feature that the
01:26 21 Plaintiffs accused us of infringement in their letter,
01:26 22 which they didn't mean when they sued us the next day,
01:26 23 in their original claim charts that they provided and in
01:26 24 claim charts submitted in this case reviewed by
01:26 25 Mr. Cooper and Dr. Zimmerman, same thing.

01:27 1 Number two, in terms of it not being
01:27 2 covered, there is no evidence. The only thing we have
01:27 3 is Mr. Cooper telling us that somebody at Apple said
01:27 4 that maybe this feature was done differently. That's
01:27 5 not evidence. That's Cooper-talk telling you that this
01:27 6 feature may have been different. We don't know, that's
01:27 7 not sufficient evidence. What we do know, what we do
01:27 8 know as a matter of indisputable fact is that the
01:27 9 license was for seven years, seven-year license covering
01:27 10 all of their products.

01:27 11 That's the Apple license.

01:27 12 Now, I want to say one word about usage
01:27 13 and IP addresses. I don't want to lose you-all. This
01:27 14 is very important. Do you remember there was a question
01:27 15 with Judge Rader, and Judge Rader read the word
01:27 16 approximately or approximate number when it should have
01:28 17 been appropriate number? The jury instruction said you
01:28 18 have to find the appropriate number of uses, and Judge
01:28 19 Rader said, you have to find the approximate number of
01:28 20 uses. Remember that? And that's a huge difference.
01:28 21 And here's why.

01:28 22 Approximate number of usage -- uses
01:28 23 doesn't work. For a damages calculation, you need to
01:28 24 know with precision, you need to know exactly the number
01:28 25 of uses. That's why that change in the jury instruction

01:28 1 is so important. That's a big difference, approximate
01:28 2 doesn't work. And what we know is the following:

01:28 3 The plaintiffs are relying on IP
01:28 4 addresses. Do you remember that? IP addresses hit the
01:28 5 servers. And there were millions of IP addresses. I
01:28 6 think for Red Hat, there's 60 -- 6.5 million IP
01:28 7 addresses, remember?

01:28 8 So what the Plaintiffs do is they take
01:28 9 that number, and they say, that's the number of units,
01:28 10 that's the number of units, 6.5 million. Here's what we
01:28 11 know, though, as a matter of fact. That's not the
01:29 12 number of units. The best the Plaintiffs will tell you
01:29 13 is it might be higher than that. It might be lower than
01:29 14 that. There is no evidence -- more than no evidence.
01:29 15 All the evidence is to the contrary that in any way IP
01:29 16 addresses approximates usage let alone demonstrates it.

01:29 17 Michael Tiemann testified unequivocally:
01:29 18 Okay. Thank you. So let's take RHEL first. Does Red
01:29 19 Hat count the number of RHEL users? No. Ever? No.
01:29 20 Does Red Hat count the number of Fedora users? No.
01:29 21 Ever? No.

01:29 22 Markus Rex: So just to be clear, is it
01:29 23 possible to determine the number of users of OpenSUSE
01:29 24 products? No, it is not. Is it possible to do that
01:29 25 using IP addresses? No, it is not.

01:29 1 Remember all the discussion of IP address?
01:29 2 You cannot look at IP addresses as the number of users.
01:29 3 They're just is a disconnect there. There is no
01:29 4 evidence to the contrary. But here's what they do. It
01:29 5 gets worse. So they start with the number of IP
01:29 6 address, right, 6.5 million IP addresses, something like
01:30 7 that. That's worldwide. Everyone knows that. That's
01:30 8 worldwide. So the first thing, and I won't keep
01:30 9 reminding you, but I want you to keep in your mind that
01:30 10 even if you talk about IP addresses as users -- as users
01:30 11 is wrong. That's wrong. All the evidence in this case
01:30 12 says that. You can't do that. But let's say we're
01:30 13 going to just for a moment and we'll follow the
01:30 14 Plaintiffs' lead on that.

01:30 15 So IP addresses are users just for
01:30 16 purposes of this discussion. But the Plaintiffs are
01:30 17 only entitled to the number of uses in the United
01:30 18 States. That's the law. They can't get uses outside
01:30 19 the United States. That's just how it works. So
01:30 20 they've got to figure out a way to go from 6.5 million
01:30 21 to -- which is worldwide -- to the number in the United
01:30 22 States, okay? There actually is one thing, and on this
01:30 23 subject, Michael Tiemann, Markus Rex, were unequivocal
01:30 24 and in agreement, there's one thing that you know with
01:30 25 certainty from IP addresses, the country of origin.

01:30 1 The IP addresses are set by the United
01:30 2 States Department of Commerce. The IP address to a 99.8
01:31 3 percent certainty tells you the country of origin. So
01:31 4 they start with the IP address, which is wrong, and they
01:31 5 say that's 6.5 million.

01:31 6 Now, they need to get to the number of
01:31 7 U.S. We know that number. We actually know that number
01:31 8 with certainty. We know the number of IP addresses that
01:31 9 are within the United States. It is 16 percent of the
01:31 10 total, slightly less than 16 percent. That's what
01:31 11 Michael Tiemann testified. That we know with certainty,
01:31 12 99.8 percent certainty. But that's a bad number for the
01:31 13 Plaintiffs.

01:31 14 Because if you start at 6.5 million and
01:31 15 you've got to only take 16 percent of that, that's
01:31 16 not -- that's not a good number. They're not happy with
01:31 17 that number. So they've got to ignore -- keep this in
01:31 18 mind, they start with IP addresses, the only thing we
01:31 19 know with certainty about IP addresses is the country of
01:31 20 origin, and they ignore that. They throw the 16 percent
01:31 21 away. Don't think about that 16 percent.

01:31 22 But they're stuck still, remember?
01:32 23 They've got to come up with a number in the United
01:32 24 States. That they have to do.

01:32 25 So how do we do that? The way they do

01:32 1 that is by mixing apples and oranges, taking something
01:32 2 totally irrelevant. They say, okay, IP addresses relate
01:32 3 to Fedora, but why don't we look at the revenue
01:32 4 associated with the Red Hat Enterprise Linux products?
01:32 5 Totally different products, totally different
01:32 6 distributions. Why don't we look at the revenue?

01:32 7 And it turns out, and you heard Michael
01:32 8 Tiemann explain why, it turns out that Red Hat gets
01:32 9 55ish percent of its revenue from the United States,
01:32 10 different products, nothing to do with IP addresses,
01:32 11 nothing to do with Fedora. They get 55 percent of their
01:32 12 revenue for these other products in the United States.

01:32 13 Well, so, what do the Plaintiffs do? They
01:32 14 say, let's ignore the number we know with certainty, the
01:32 15 16 percent of IP addresses, that we know absolutely with
01:32 16 certainty. Let's ignore that. Let's take 55 percent
01:32 17 instead from the revenue numbers and let's use that
01:33 18 because that will give us a better number.

01:33 19 Not only is that funny math, not only is
01:33 20 that no possible way to conceive of a damages award, but
01:33 21 it captures perfectly what this case is about. This
01:33 22 case has had no merit from the start. We don't infringe
01:33 23 these patents. We never have. The patents are invalid,
01:33 24 those machines invalidate the patents. The patents are
01:33 25 invalid because of the joint Inventorship issues. The

01:33 1 patents should never have been allowed out of the patent
01:33 2 office and they shouldn't have been asserted against my
01:33 3 clients.

01:33 4 And we -- if there are damages, it's a
01:33 5 very, very low number. When you think about all the
01:33 6 other licenses out there, 100,000, 95,000, zero, all the
01:33 7 other licenses out there, it's a very low number. And
01:33 8 so you have -- you have red herrings on the
01:33 9 infringement, you have slight of hand on the invalidity,
01:33 10 and you have funny voodoo math on the damages, all
01:34 11 hoping that with confusion and distraction and throwing
01:34 12 up enough concepts and enough red checks on the board,
01:34 13 there's just the possibility, a hope, maybe, you-all
01:34 14 will go back, be confused, throw up your hands, and give
01:34 15 the Plaintiffs some money.

01:34 16 That's not how it works. That's not how
01:34 17 it should work. That's why every day in every way we
01:34 18 have tried to make this clear for you. We know that
01:34 19 when you get it, when you understand the issues, when
01:34 20 you see what our products do, when you see what the
01:34 21 prior art does, when you understand what the patent
01:34 22 means, when you get what they're doing with the math, it
01:34 23 will be very clear that the case has no merit and that
01:34 24 they should be awarded no damages.

01:34 25 Thank you very much.

01:34 1 THE COURT: Mr. Hill, how long will you
01:34 2 be?

01:34 3 MR. HILL: Probably 15 minutes at a
01:34 4 maximum.

01:34 5 THE COURT: As we've discussed, the party
01:35 6 with the burden has the last word.

01:35 7 Mr. Hill.

01:35 8 MR. HILL: Thank you, Your Honor.

01:35 9 Ladies and Gentlemen, thank you for your
01:35 10 attention throughout this trial.

01:35 11 I want to talk to you a little bit about a
01:35 12 couple things. I want to ask you to do something for
01:35 13 me. There's a reason, Ladies and Gentlemen, that we've
01:35 14 been here for a week. And it wasn't so that we could
01:35 15 try to cram everything in your throat in the last hour.

01:35 16 We do this for a week because we have to
01:35 17 present evidence to you. And as the Judge told you and
01:35 18 as in the written instructions you'll take back to the
01:35 19 jury room, what the lawyers stand up and tell you, isn't
01:35 20 evidence. What I'm standing here telling you right now
01:35 21 can't be the basis for your decision.

01:36 22 So I want to ask you to do something for
01:36 23 me. I want to ask you to just focus in your mind on
01:36 24 where you were two hours ago. Think about it. What
01:36 25 were your thoughts of the evidence before you heard a

01:36 1 bunch of argument, before you heard a bunch of things
01:36 2 that couldn't be the basis for a decision, what were
01:36 3 your thoughts of the evidence that you had heard over
01:36 4 the past week.

01:36 5 You heard the Judge read you the legal
01:36 6 instructions. At the end of those legal discussions --
01:36 7 or the legal instructions where he gave you the law,
01:36 8 right there fix your mind. Fix your mind because that's
01:37 9 the point at which you've got to make a decision. At
01:37 10 that point in time, you had everything that Judge Rader
01:37 11 has told you you can and should rely upon to decide the
01:37 12 questions that he has put in front of you on that
01:37 13 verdict form, right then.

01:37 14 Now, I will give it to Mr. Krevitt, he is
01:37 15 a very skilled advocate. He presented to you a very
01:37 16 robust presentation of what they say the world looks
01:37 17 like of what they say went on in this courtroom over the
01:37 18 last five days.

01:38 19 But with all due respect to Mr. Krevitt,
01:38 20 the way he sees the world ain't why we're here. Why
01:38 21 we're here is to find out how you folks see the world,
01:38 22 to find out what was in your mind once you had heard the
01:38 23 evidence and once you had heard the law from Judge
01:38 24 Rader.

01:38 25 That's the reason we're here. And I want

01:38 1 to make one point to you about something that
01:38 2 Mr. Krevitt had to say. He told you that clarity is our
01:38 3 friend. His friend. That's what he said. He told you
01:38 4 clarity is his friend. I want you to think back on the
01:38 5 evidence in this case. I want you to think about
01:39 6 whether the things he just told you were matched with
01:39 7 what you remember to be so.

01:39 8 You folks have taken extensive notes
01:39 9 through this trial. Look back at your notes. Look
01:39 10 at your notes and remember some of the statements that
01:39 11 Mr. Krevitt just gave you. See if they jive with your
01:39 12 recollection of these witnesses, with your recollection
01:39 13 of the evidence you had presented to you.

01:39 14 I want to show you one thing. I want to
01:39 15 look at the document camera to do it. Mr. Krevitt made
01:39 16 a big point about a comment that Judge Rader reread out
01:39 17 of the jury instructions on the issue of damages. He
01:39 18 said to you that damages have to be determined -- this
01:39 19 was his word -- with precision. Precision. That
01:39 20 conveys a definite meaning. Precision. Let's look at
01:40 21 the jury instruction. Let's look right there at the
01:40 22 bottom of the last page of what the Judge just told you
01:40 23 was the law.

01:40 24 Plaintiffs satisfy their burden by showing
01:40 25 the extent of damages as a matter of just reasonable

01:40 1 inference, even if the damages are established by an
01:40 2 approximation. Does that say even if the damages are
01:40 3 established with precision or they must be established
01:40 4 with precision? No, it doesn't.

01:40 5 I don't show you that because I don't
01:40 6 believe that we've proven damages in this case. I
01:40 7 believe we have. You folks saw the evidence. I believe
01:40 8 we've proven every element of each cause of action.

01:40 9 You folks got to hear Dr. Zimmerman on day
01:40 10 one, I believe it was, testify about infringement in
01:40 11 this case and walk you through the claim language and
01:40 12 show you screen shots from the accused products so that
01:40 13 you could decide in your mind whether we had met each of
01:41 14 those claim limitations, whether these accused products
01:41 15 practice, tread on our property.

01:41 16 But Mr. Krevitt, to hear him talk, that
01:41 17 didn't happen. The reason I show you that, folks, is
01:41 18 that this is like all lawsuits, it comes down to
01:41 19 deciding who you believe. It comes down to credibility.
01:41 20 Credibility.

01:41 21 If you look at the evidence that's
01:41 22 presented to you and then you see that evidence get
01:41 23 tested on cross-examination, and you have to decide,
01:41 24 we've got two people saying different things, and each
01:41 25 person's story is being tested. It's being tested in

01:41 1 what we, in this American system of justice, call the
01:42 2 crucible of trial. That's what we do here.

01:42 3 We lay the evidence out before you so that
01:42 4 you folks can decide what is the truth, not who's got
01:42 5 the best lawyer, not who can put the best spin on it,
01:42 6 but who can tell you and is telling you the truth.

01:42 7 You've had a chance for a week to look at
01:42 8 the claim language out of these patents. You've had a
01:42 9 chance for a week to see pictures of their products and
01:42 10 how they operate. You've had a chance for a week to see
01:42 11 the source code from those products to show that they
01:42 12 function as described in these patents. And you've had
01:42 13 a week to hear people tell you, didn't do it, can't do
01:42 14 it, but if we do do it, somebody did it before us. And
01:42 15 if we do do it, maybe they were too generous in giving
01:43 16 credit for the invention. And if we do do it and the
01:43 17 patents are valid, well, we really can't figure out how
01:43 18 many of these things we sell. And if we do do it and
01:43 19 the patents are valid and we can't figure out how many
01:43 20 of these things they sell, the attempts they make to
01:43 21 figure out how many we sold, those aren't any good.

01:43 22 Where does it stop? Where does the
01:43 23 cafeteria line stop? They want to lay it out there for
01:43 24 you and ask you to pick off their cafeteria-line
01:43 25 defense.

01:43 1 But all you folks have to do is focus on
01:43 2 the evidence. And if you focus on the evidence and you
01:43 3 focus on what you see in this courtroom, a Plaintiff who
01:43 4 decided they wanted to stand up for their property
01:43 5 rights, knowing when they stood up for the property
01:44 6 rights that they were going against the behemoths of the
01:44 7 industry, knowing that they were going against people
01:44 8 who openly say they hate software patents, knowing that
01:44 9 they were going to have to sue those folks, and they
01:44 10 were going to be put through three years of hell just to
01:44 11 get here to try to get a fair shake to try to hope that
01:44 12 a jury would look at the situation and judge it on the
01:44 13 facts, judge it by what they believe is the truth, not
01:44 14 by what the best experts you can buy, that you can
01:44 15 purchase, and the best lawyers you can hire. Not
01:44 16 depending on how they can spin it.

01:44 17 My clients took that on. And they knew it
01:44 18 would be -- they'd have to weather the storm to get
01:44 19 here, and they have. They've weathered the storm. And
01:45 20 now they want you folks to find the truth. And they
01:45 21 want you folks to look at their invention, look at the
01:45 22 products that they believe practice their invention and
01:45 23 award them what is fair and just compensation for
01:45 24 somebody trading on other people's property.

01:45 25 Thank you for your time. I appreciate

01:45 1 your hard work this week. I appreciate the hard work
01:45 2 you're fixing to have to go do. And I thank you for
01:45 3 your verdict. Thank you, Your Honor.

01:45 4 THE COURT: Ladies and gentlemen, we've
01:45 5 reached the point where you will deliberate, you will
01:45 6 deliberate according to the instructions I've given you,
01:45 7 you will follow the law I've given you. You will bring
01:45 8 us a verdict. If you need to communicate, follow the
01:45 9 instructions I've given you on that.

01:45 10 Thank you very much for your service.
01:45 11 We'll hear from you again when you have a verdict.
01:46 12 Thank you.

01:46 13 All rise for the jury.

01:46 14 (Jury out.)

01:46 15 THE COURT: Gentlemen, I'll have access to
01:46 16 you if I need you? That means I need somebody here at
01:46 17 the -- I need somebody here at the courthouse at all
01:47 18 times so that, if necessary, I get a question or
01:47 19 something, I can have access to all of you within
01:47 20 minutes, please. Thank you very much.

01:47 21 MR. LYON: One minute, Your Honor, just
01:47 22 these disks need to be taken into the jury room, I
01:47 23 understand.

01:47 24 THE COURT: That is correct.

01:47 25 Will you take care of that, Mr. Stewart

01:47 1 and Ms. Dickman.

01:47 2 (Recess.)

01:47 3 (Jury out.)

4 THE COURT: We've received a communication
02:58 5 from the jurors, and I'll read it. It says simply:
02:58 6 Copy of Judge's instructions.

02:58 7 MR. GASEY: I think there was an agreement
02:59 8 between the parties last night that we weren't going to
02:59 9 supply the instructions, and in the absence of getting
02:59 10 Defendants' lawyers crossways with their partners, I
02:59 11 think we should probably stick with that agreement for
02:59 12 the moment, Your Honor.

02:59 13 MS. LAVALLE: That's correct. We did
02:59 14 agree.

02:59 15 THE COURT: Then I will draft a response,
02:59 16 which I'll read to both of you.

02:59 17 MR. GASEY: All right.

02:59 18 MR. GIBBONS: Just so it's clear, the
02:59 19 instructions Your Honor read to the jury, right?

03:00 20 DEPUTY CLERK: Right.

03:00 21 (Pause in the proceedings.)

03:00 22 THE COURT: Ms. LaValle, Mr. Hill,
03:00 23 Mr. Gasey: Because you've both heard and read along
03:00 24 with the Court's legal instructions, you've received all
03:00 25 you need to receive to proceed for a verdict, Judge

03:00 1 Rader.

03:00 2 Will that be fine?

03:00 3 MR. GASEY: It's agreeable with us, Your
03:00 4 Honor.

03:00 5 MS. LAVALLE: Yes.

03:01 6 THE COURT: Thanks. If you'd stay
03:01 7 available. We never know what they may want to hear
03:01 8 from us.

03:01 9 (Further jury deliberations.)

03:54 10 (Jury out.)

03:54 11 THE COURT: I understand we have a
04:00 12 verdict. We're all professionals and we've probably
04:00 13 done this plenty of times, but it's never inappropriate
04:00 14 to remind ourselves that we don't react whatsoever to
04:00 15 whatever they say. There are times for reaction outside
04:00 16 of the courtroom later.

04:00 17 I'm going to call them in; we'll hear that
04:00 18 verdict.

04:00 19 Do you wish to have the jury polled?

04:00 20 MR. HILL: No, Your Honor, not from the
04:00 21 Plaintiffs.

04:00 22 THE COURT: Mr. Krevitt, do you wish to
04:00 23 have the jury polled?

04:00 24 MR. KREVITT: No, Your Honor.

04:00 25 THE COURT: Then we'll take their verdict,

04:00 1 and then I'm going to go back and talk to them for a few
04:01 2 minutes. I'll tell them a couple of things. I'll tell
04:01 3 them that under Eastern District rules, you're not to
04:01 4 contact them, but they could contact you and that you'd
04:01 5 probably all like to talk to them, if they do.

04:01 6 And I'll also listen to them a little bit.
04:01 7 It's always important for them to feel like they've had
04:01 8 a chance to air their views a little bit to me. So I'll
04:01 9 do that.

04:01 10 Then I'll return here, and I would like to
04:01 11 have just a minute to tie up loose ends, see what we may
04:01 12 need to do from here or not do from here.

04:01 13 All ready?

04:01 14 MR. GASEY: Yes, Your Honor.

04:03 15 (Jury in.)

04:03 16 THE COURT: Please be seated.

04:03 17 May I inquire who is the Foreperson?

04:03 18 Ms. Bates?

04:03 19 FOREPERSON: Yes.

04:03 20 THE COURT: Would you get from Ms. Bates
04:03 21 the verdict form. I'll return that to you in just one
04:03 22 moment. I'm just checking to make sure it's completed
04:04 23 at this point.

04:04 24 FOREPERSON: Yes, sir.

04:04 25 (Pause in the proceedings.)

04:04 1 THE COURT: It does appear complete.
04:04 2 Would you take that back to Ms. Bates.
04:04 3 Ms. Bates, would you stay standing, and
04:04 4 I'm going to ask you -- there are 23 questions there.
04:04 5 I'm going to ask you just in numerical order. I think
04:04 6 we all know what the questions are. I'll ask you
04:04 7 Question No. 1, 2, 3, 4 --
04:04 8 FOREPERSON: Okay.
04:04 9 THE COURT: -- all through the 23, and
04:04 10 you'll just give me the unanimous verdict of your jury.
04:05 11 Question 1 is a yes or no on infringement.
04:05 12 FOREPERSON: No.
04:05 13 THE COURT: Question 2?
04:05 14 FOREPERSON: No.
04:05 15 THE COURT: Question 3?
04:05 16 FOREPERSON: No.
04:05 17 THE COURT: Question 4?
04:05 18 FOREPERSON: No.
04:05 19 THE COURT: Question 5?
04:05 20 FOREPERSON: No.
04:05 21 THE COURT: Question 6?
04:05 22 FOREPERSON: No.
04:05 23 THE COURT: Question 7?
04:05 24 FOREPERSON: No.
04:05 25 THE COURT: Question 8?

04:05 1 FOREPERSON: No.

04:05 2 THE COURT: Question 9?

04:05 3 FOREPERSON: No.

04:05 4 THE COURT: Question 10?

04:05 5 FOREPERSON: No.

04:05 6 THE COURT: Question 11?

04:05 7 FOREPERSON: No.

04:05 8 THE COURT: Question 12?

04:05 9 FOREPERSON: No.

04:05 10 THE COURT: Question 13?

04:05 11 FOREPERSON: No.

04:05 12 THE COURT: Question 14?

04:05 13 FOREPERSON: No.

04:05 14 THE COURT: Question 15?

04:05 15 FOREPERSON: No.

04:05 16 THE COURT: Question 16?

04:05 17 FOREPERSON: No.

04:05 18 THE COURT: Question 17?

04:05 19 FOREPERSON: Yes.

04:05 20 THE COURT: Question 18?

04:05 21 FOREPERSON: Yes.

04:05 22 THE COURT: Question 19?

04:06 23 FOREPERSON: Yes.

04:06 24 THE COURT: Question 20?

04:06 25 FOREPERSON: Yes.

04:06 1 THE COURT: Question 21?

04:06 2 FOREPERSON: Yes.

04:06 3 THE COURT: Question 22?

04:06 4 FOREPERSON: Zero.

04:06 5 THE COURT: Question 23?

04:06 6 FOREPERSON: Zero.

04:06 7 THE COURT: Thank you. Now if you will
04:06 8 return that to the verdict form.

04:06 9 Yes, we'll give that to Jan.

04:06 10 Everything clear, Mr. Krevitt, Mr. Gasey?

04:06 11 MR. GASEY: Yes, Your Honor.

04:06 12 MR. KREVITT: Yes, Your Honor.

04:06 13 THE COURT: Fine. What I'd like to do at
04:06 14 this point is first, in the presence of everyone who's
04:06 15 participated here, I'd like to express our great thanks
04:06 16 to you for your time and your efforts. And I'm going to
04:07 17 express even more than that in just a few moments.

04:07 18 I'd like to return with you to the jury
04:07 19 room and just for a few minutes be available to you to
04:07 20 ask me, if I won my last tennis match, or anything else.
04:07 21 I wish to just be available to you for a few minutes.

04:07 22 I have a few things I'd like to say to you
04:07 23 to kind of wrap things up. And I'll do that, and then
04:07 24 I'll return here for just a few minutes with all of you,
04:07 25 if I may.

04:07 1 So, once again, formally, in front of all
04:07 2 of those who participated, we thank you. And you're
04:07 3 dismissed from your responsibilities, and I'll join you
04:07 4 for a moment.

04:07 5 (Jury out.)

04:08 6 (Recess.)

04:08 7 THE COURT: I'm sorry to hold you here for
04:24 8 a little longer. Could we talk just a little?

04:24 9 One thing I wanted to say that probably is
04:24 10 well understood, but I want to say it anyway, and that
04:24 11 is when this case is appealed, and I expect it will be,
04:24 12 I can absolutely guarantee you that Circuit Judge Rader
04:24 13 will have absolutely no knowledge about when the case is
04:24 14 filed.

04:24 15 Even though at that time, he'll be the
04:24 16 Chief Judge, he will ensure that he does not even know
04:24 17 when it's to be heard. The Cornell case that I handled
04:24 18 last year was heard last month. I didn't know that
04:24 19 until one of my colleagues mentioned in the elevator.

04:25 20 They were swiftly upbraided that they
04:25 21 should not have mentioned it in the elevator, but I'm
04:25 22 just mentioning that so you know that I will not have
04:25 23 anything to do with that.

04:25 24 And if we have altogether made some
04:25 25 mistake, we'll come back and we'll do this again, and

04:25 1 I'll come back and do it.

04:25 2 Now, what remains for us to do, I need
04:25 3 advice from any of you on things that we might need to
04:25 4 follow up with.

04:25 5 MR. HILL: Your Honor, at this point --

04:25 6 MR. REITER: Do you guys want to -- we
04:25 7 have the Rule 50 after judgment, which obviously this is
04:25 8 a judgment.

04:25 9 But do you guys want to pick a day, like a
04:25 10 week --

04:25 11 MR. GASEY: That's fine. If we could have
04:26 12 a week to go ahead and to file and get perfected our
04:26 13 Rule 50 motions.

04:26 14 THE COURT: That would be just fine. Is a
04:26 15 week enough?

04:26 16 MR. REITER: How about two weeks?

04:26 17 MR. GASEY: Two is fine with us.

04:26 18 THE COURT: We've all been rushing to get
04:26 19 to this point, and we don't have to rush anymore. So
04:26 20 two weeks will be fine with me.

04:26 21 Mr. Gasey and Mr. Reiter, Mr. Krevitt, two
04:26 22 weeks then.

04:26 23 Anything beyond that?

04:26 24 MR. GASEY: Not from the Plaintiffs.

04:26 25 THE COURT: I assume that --

04:26 1 COURT ROOM DEPUTY: The trial exhibits.

04:26 2 THE COURT: Yes, what do we do with the
04:26 3 trial exhibits?

04:26 4 MR. REITER: Until judgment is entered, I
04:26 5 think they have to stay with the Court.

04:26 6 THE COURT: Well, I will enter judgment
04:26 7 forthwith, if there's no reason for me to slow down.

04:27 8 MR. GASEY: No, Your Honor.

04:27 9 THE COURT: Then that will happen as soon
04:27 10 as I can find the right form and sign it. And if
04:27 11 there's nothing further, then I will release you.

04:27 12 And let me say that regardless of
04:27 13 outcomes, it's kind of sad that there's an outcome in
04:27 14 these sorts of events, but there is. I've been
04:27 15 absolutely delighted with the character and performance
04:27 16 of counsel.

04:27 17 I came down here to the Eastern District
04:27 18 for a couple reasons, and I can say I was impressed
04:27 19 enormously with the jury pool. I've told you that.
04:28 20 I've never had a jury pool where people didn't try to
04:28 21 evade responsibility more than accept it, and you don't
04:28 22 see that here. And I thought counsel can be enormously
04:28 23 proud of themselves on both sides.

04:28 24 Thank you, Gentlemen.

04:28 25 There's an order been filed you're to

04:28 1 follow that you get to take away the exhibits, but
04:28 2 you've agreed to file copies on a DVD that I will
04:28 3 receive, that the Court will receive.

04:28 4 You understand all that?

04:28 5 MR. GASEY: Yes.

04:28 6 MR. REITER: That's fine, Your Honor.

04:29 7 THE COURT: It's on the record.

04:29 8 COURT ROOM DEPUTY: The original patents
04:29 9 are in the jury room. Do you want to take those?

04:29 10 MR. GASEY: Yes.

11 (Court adjourned.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

DONNA COLLINS, CSR
Deputy Official Court Reporter
State of Texas No. 1086
Expiration Date: 12/31/10

Date

GLENDA FULLER, CSR
Deputy Official Court Reporter
State of Texas No. 1042
Expiration Date: 12/31/10

Date

09:21